SUPREME COURT, U. S.

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IN THE

Supreme Court of The United States

October Term, 1968

No. 1406

WESTWARD COACH MANUFACTURING COMPANY, INC., and RAY GRAINGER, Trustee in Bankruptcy of Westward Coach Manufacturing Company, Inc.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in the above cases on January 9, 1968, rehearing denial entered on February 7, 1968.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Indiana is reported at 258 F.S. 67, 150 U.S.P.Q.

495. The opinion of the Court of Appeals for the Seventh Circuit is reported at 388 F2d 627, 156 U.S.P.Q. 437. Such opinions are appended hereto (App. pp. 2 and 50.)

JURISDICTION

The judgments of the United States Court of Appeals for the Seventh Circuit were made and entered on January 9, 1968, and the petition for rehearing was denied on February 7, 1968; and copies thereof are appended to this petition in the Appendix at pp. 50 and 66. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED IN TERMS AND CIRCUMSTANCES OF THE CASE

This controversy involves the denial, by summary judgment, of the protectability for Westward of its trademark rights in "Mustang" for campers and trailers, against the subsequent use by Ford's closely-related use on sport cars. Westward had fore-warned Ford many months prior to Ford's production entry; and that notice contained a specific warning that the public might assume Westward was affiliated with Ford. Very widespread and intensely strong actual confusion has been shown, which has severely injured Westward (even though the glittering success of Ford's "Mustang" for Ford might cause an unthinking person, on a first-glance supposition, to jump to an erroneous conclusion that Ford's use would automatically benefit Westward).

By far the greatest bulk of the actual confusion (and of the injury), so far learned of, has been of an unusually extreme (although forewarned) type; that is, instead of

a usual or "free-ride" situation where the public assumes the second user to be affiliated with the first user, the public has here assumed that Westward is a dependent affiliate of Ford. In contrast to the usual "free ride" motive of a second user, here the second user's motive seems more aptly termed a wanton and reckless disregard; and the particular type of widespread affiliation-confusion, shown actually resulting, has been designated to be "reverse" from the usual type. However, rather than its bad effect on Westward's goodwill being *reverse* from the usual bad effect of a free-ride type of infringement, its effect has been, even worse, an infinite *forward* extension of the usual loss of its goodwill on its own products, to a large extent not merely a goodwill-jeopardy but a goodwill-dissipation altogether.

Yet the Court below affirmed a summary judgment for Ford, asserting that "reverse confusion" provides "no rational basis for support" of Westward's cause, ignoring the widespread and goodwill-jeopardizing and forewarned confusion.

Thus the controlling question is:

Does the basic rationale of trademark protection (i.e., the protection of an earlier user's goodwill against jeopardy by a subsequent closely-related use) permit as an exception to protectability of one's own mark for his own products, a forewarned second use which is in a very close and overlapping field, and which by promotional expenditures vastly greater than the earlier user's does not only likely prejudice the earlier user's goodwill by a small nick but actually extends the affiliation-confusion forwardly to the ultimate point where the affiliation-supposition has become indeed "reverse" and the public

thinks the earlier user is a dependent affiliate of the other, or thinks it is actually the earlier user who is attempting to cheat, or has other adverse effects.

(The Appellate Court also be-littled Westward's $1,800,000 sales as having been small in proportion to the entire recreational vehicle sales; be-littled Westward's interstate usage, with nationwide advertising, as having been in only 28 of the 50 states; be-littled and ignored Westward's many exhibits and affidavits (on summary judgment) from competitors and other sources to the effect that Westward's mark was strong on its products, by asserting that Plaintiffs "could not rely on the mere allegations of their complaint" as to that issue; be-littled Westward's advertising expenditures of $93,000, admittedly paltry in comparison to Ford's subsequent exploitation. However, the questions involved in such defenses are set forth in the argument rather than here duplicated, particularly because the great weight of all judicial and treatise authority treats these and other asserted defenses as of no avail (except as to amount of damages) where actionable confusion is even merely likely (in this type of case involving a non-descriptive word and which does not involve any attempt whatever by the earlier user to monopolize a product design or any unpatented article). Thus the dominant and controlling issue is the "protectability against reverse confusion.")

CONSTITUTIONAL PROVISIONS, STATUTES, AND F.R.C.P. INVOLVED

The pertinent portions of United States Constitution, (Art. I, Sec. 8 and the Fifth and Fourteenth Amendments) are set forth in the Appendix hereto at p. 88, 15

U.S.C. 1114 at p. 71, Burns Indiana Statutes Ann. Sec. 66: 142-144 at p. 72, and F.R.C.P. 56 at p. 88.

STATEMENT OF THE CASE FACTS

Plaintiff Westward Coach Manufacturing Company, Inc., was the family-owned successor to Westward Coach Manufacturing Company, which had been established in 1960 by E. Edward Enochs; and the two companies have, consecutively, since 1960, used the trademark "Mustang" for campers, and since 1962 also for travel trailers (App. 20.) Their "Mustang" products enjoyed a very high reputation as a quality product at a quality price (App. 74, 77, 79, 81, 82, 84, 85), were extensively nationally advertised (App. 78, 84, 86), and enjoyed the highest or 5-star rating by a national trade journal (App. 81). Sales had grown from $31,000.00 in 1960 to several hundred thousand dollars per year (App. 24, 84). Westward had developed a property right for its mark "Mustang" for its products, as the District Court expressly found (App. 78, 86, 33).

Westward's continually developing goodwill had brought in so many orders that it had been forced in 1963 to turn away four times its business because it lacked production capacity (App. 83), and therefore planned, before Ford's entry, to quadruple capacity (App. 83); and that extensive building program was completed in 1964 (App. 83, 84). Its advertising was over $133,000.00 from 1960 to 1965, with sales volume over $1,800,000.00 (App. 24).

In 1962, Westward saw an advertisement of a Ford "display car" named "Mustang," and immediately wrote to Ford, specifically calling attention to Westward's prior use, and advising that a confusion would be likely, and specifically that a reverse affiliation-confusion would be

likely which would have injurious effect to Westward (App. 67-68).

Ford's vice-president replied, by letter, be-littling the matter; and he assured Westward that Ford honored trademark rights of others, and asserted that there was no likelihood of confusion, the Ford use being only for a "display car" (App. 70-71).

Following Ford's commercial "Mustang" entry in 1964, and in spite of 1964 and 1965 being good years of sales in the recreational vehicle field (App. 79), Westward's sales fell short of expectations (App. 83), and it took many money-losing steps to bolster sales (App. 85). Dealers, particularly those who handled non-Ford automobiles, were lost; and others who also were non-Ford car dealers could not be cultivated (App. 77, 78, 82). Business got so bad that bankruptcy ensued in the winter of 1965 (App. 55).

Westward had obtained an Indiana state trademark registration in January, 1962 (App. 52), and in October, 1962 had applied for federal trademark registration, which was granted as Reg. No. 834,606 on September 5, 1967 (App. 53).

Confusion, caused by Ford's entry, was shown to be very likely from not merely one but several standpoints: Joint dealerships (App. 26, 54, 82); joint promotions (App. 54, 81, 86); joint display in advertising and use (App. 79, 80, 81, 83, 86, 87); joint terminology (App. 54, 80, 85, 87); other automotive manufacturers are in the trailer field (App. 56, 83, 86); a common market of users and dealers, as the Trial Court expressly found (App. 26, 56), etc. Both are overall-type pleasure vehicles for highway use, having similar components such as seats

and bodies, and similar attributes such as roadability, weather-tightness, etc.

Confusion was learned to be actual, and widespread over many states (App. 74-75, 76, 77, 82, 60), and so strong that persons could not be convinced that their mistaken assumption was wrong. (App. 76). A very small proportion of the actual confusion was of a "customary" type involving such matters as mis-directed mail. The great proportion of the actual confusion was of a "reverse-type" supposition that Westward was a dependent affiliate of Ford (App. 74, 75, 76, 77, 82, 60).

Subsequent to the plaintiff Westward's bankruptcy, which was several months after this action was instituted, the Trial Court added as a party plaintiff Ray Grainger, Trustee in Bankruptcy (App. 55).

In the bankruptcy sale, Mr. Enochs, as well as the many creditors, had been designated to receive the greater proportion of all recovery from Ford. This entire arrangement was sanctioned by the Bankruptcy Court (App. 55). After all, it was the only apparent means for avoiding the many creditors' losses as well as for giving some salvage compensation to the Enochs family for the loss caused by the shattering of their growing family business in which they had so personally invested their money, time, and personal effort and personal sacrifices in the building up of the promising business.

After the Trial Court's summary judgment for Ford, the Enochs family moved to be added as named plaintiffs (App. 51), primarily to minimize the actual (even though improper) reliance by the Trial Court upon the view of the bankruptcy buyers as to the pre-bankruptcy history they had not experienced. This motion to be added was

denied by the Trial Court; and The Appellate Court affirmed the summary judgment and the denial of intervention.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The federal jurisdiction was founded upon diversity of citizenship, the matter in controversy exceeding, exclusive of interest and costs, the sum of Ten Thousand ($10,000) Dollars. Westward's United States Trademark Registration was not issued until the case was on appeal, September 5, 1967. (No. 834,606)

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals Has Rendered A Decision In Conflict With Other Federal Authorities, By Denying Or Ignoring The Recognized Basis of Trademark Protection

"Reverse confusion-nature" is not properly an exception to the protectability of a trademark on one's own goods; for, rather than reversing the effect on the earlier-user, it more (not less) jeopardizes his own goodwill. And protection against *any* reputation-jeopardy is consistently stated by all other federal authorities as the basis of trademark protection; and is inherent in the rationale of other federal authorities, and the federal statute, which assert that even mere confusion-likelihood is the ultimate criteria of trademark protection, particularly since the requisites of palming off and direct competition have been discarded.

For example, the 2nd Circuit has seen reputation-jeopardy as the ultimate criteria of protectability at least ever since Judge Learned Hand wrote:

> "If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful. ... The defendant need not permit another to attach to its good will the consequences of trade methods not its own." *Yale Electric Corporation v. Robertson*, 26 F.2d 972 (2 Cir. 1928)

The 9th Circuit, likewise, citing the Learned Hand decision, finds protectability where the second use is not so foreign as to insure against any identification of the two. (*Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149 (9th Cir. 1963). (After citing this case with approval in *Tisch Hotels v. Americana Inn*, 350 F.2d 609, (7th Cir. 1965), the Seventh Circuit ignored both it and *Americana* in ruling for Ford here.)

The federal trademark statute (15 U.S.C.A. 1114, quoted at App. p. 71) expressly protects against any subsequent use likely to cause confusion or mistake (without qualification or limitation as to a "frontwards" or "reverse" type). If there were ever any doubt about an exception, it was removed by the 1962 amendment which removed a perhaps-qualifying phrase (App. 71).

The federal trademark statute's parallel passage dealing with registration has been consistently interpreted by the Patent Office, and the federal Courts having appellate jurisdiction thereover, as to avoid *all* types of likely confusion, including in particular the type in which the larger user is the second user (with apparently thus

a likelihood of "reverse" type confusion). E.g., *Castle & Cooke, Inc. v. Joseph E. Seagram & Sons,* 145 USPQ 715, 716 (CCPA 1965).

The 8th Circuit, likewise, sees reputation-jeopardy protection as the basis of trademark protection:

> "Plaintiff has the right to make and keep its own reputation without intrusting it to others over whom it cannot exercise any control. ... Plaintiff's vested and existing rights cannot be overpowered merely by defendants' comparatively massive size and generous promotional expenditures." *Sweetarts v. Sunline, Inc.,* 380 F2d 923, 927, 928, 154 USPQ 459, 462, 463 (8th Cir. 1967)

Modern day treatises, citing many authorities, see protection against goodwill-jeopardy as the real basis of trademark protection, as is illustrated by the *Restatement of Torts* (Tentative Draft No. 8, April 22, 1963) Sec. 717 and 731).

And reputation and goodwill are not merely jeopardized in a "reverse confusion" case; their jeopardy is infinitely extended "forwardly" to the point where the earlier user's goodwill is in effect swallowed up or largely dissipated.

Any unthinking notion that reverse confusion would be a blessing to an earlier user is simply not true. For example, even a Ford-devoted person would not likely buy a Westward product; for he might think Westward is a cheating free-rider on Ford, and does not have the ability to succeed on its own merit. Or he might shun the Westward dealer, thinking he could buy the supposedly Ford product cheaper from a Ford dealer, or have it serviced better from a Ford dealer.

A non-Ford devotee would likely have some of the same objections; and, even stronger, he might not want to pull a supposedly-Ford trailer behind his Buick or Chrysler.

Non-Ford dealers stopped handling Westward's "Mustang" products, and others could not be cultivated. (App. 77, 78, 82).

Whatever the psychological factors of sales resistance may be, the tragic fact is that Westward's business condition grew progressively worse after the Ford confusion began, finally to bankruptcy. And continuing even today in 1968 it is still in bad financial trouble, even though it has gone through three sets of administrations still struggling to maintain the "Mustang" line, and even though product-quality and various other changes have been made.

The law cannot in good conscience force an earlier user to accept the forewarned intrusion of this nature, regardless whether it be termed "reverse" or "forward" or otherwise.

The carving out of a "reverse-permitted" exception to protectability would be a retrogressive setback to trademark law, which increasingly through many years has discarded one defense after another, as the rationale of trademark protection has yielded to the significance of goodwill-protection as being the real basis of protectability. Thus, goodwill-protection has rightly been given paramount and controlling significance where no unlawful patent-type monopoly was being attempted via the trademark enforcement. Those discarded defenses have included, e.g., requirements that palming-off be shown; that the persons confused were actual purchase-consumating purchasers rather than prospective purchasers; that diversion of business specifically to the defendant be

shown; that both goods had the "same descriptive properties," as the repealed 1905 Act had stated; etc.

Viewed simply as a matter of logic or reason, an exception as to non-protectability against "reverse confusion" cannot be upheld; for, to insist that confusion must be of the usual type of a "frontward" or free-ride effect, is to say, in effect: Protection is awarded against only a small-scale second-use which begins small and stays small and creates but a relatively small goodwill-jeopardy; but protection becomes lost if the second-use is larger with the resulting greater harm by building up a "reverse" type of affiliation-confusion. Such a "might makes right" notion is monstrously untenable.

2. The Court Of Appeals Has Rendered A Decision On A Novel Point Of Law Which Cannot Await A Conflicting Decision On The Precise Point, For Its Rationale Permits And Even Encourages A Larger Company To Crush The Goodwill Of A Smaller Company, And Retards Major Business Planning Until Clarified By This Court. Its Rationale Is Not Based On Nor Limited To Indiana Law.

The monstrous unfairness to any smaller company, of an appellate decision which so favors a larger company as to sanction a trademark violation if it is so severe as to achieve a general dissipation or "reverse-confusion" swallowing up of a smaller company's goodwill rather than merely nick it in a customary or "frontwards-confusion" manner, cries out for this Court to not await a conflicting decision on the precise point.

Big business cannot be permitted the might-makes-right temptation implicit in this decision as to a substantive point of trademark law, even if it is designated as "merely

Indiana law," particularly because a Court of the status of a Federal Appellate Court has so scoffed at the idea of protection against this type of affiliation-confusion, and because the exception to protectability was expressly asserted by the Court as not required by Indiana law in particular, nor based on Indiana law.

Big business must know that the law does not encourage a trade-mark confusion, particularly one of a ruthless "reverse-confusion" nature, for reasons already presented.

After all, the issue here involves a vital concept of business planning, usually involving many hundreds of thousands of dollars, and years of time, in choosing and promoting an identifying name for one's products. Business must not be mis-led into thinking that a small company's trademark is not protectable against an overwhelmingly larger use, which is the untenable basis of the Court of Appeals' decision.

3. The Court Of Appeals Denied Justice To Westward By Recognizing That Westward Had A Protectable Interest In The Trademark For Its Campers And Trailers, And Yet It Denied Westward That Protection To Precisely Those Same Goods. This Is A Denial Of Due Process, And Of Equal Protection, And Calls For An Exercise Of This Court's Supervision.

Westward has sought no extension of its trademark rights. Westward's goal here has related to its desire for protection of its trademark for campers and trailers, not cars; but the Courts below seemed to be wedded always to an inquiry couched in terms of whether a right "extends" to cars or on cars, although the only issue in that

regard is the protectability, *for campers and trailers*, against the confusion-breeding use which happens to be cars.

The Appellate Court acknowledges and stresses that Westward has trademark rights on campers and trailers; and since widespread public confusion as to a supposed business affiliation of these parties has been more than amply demonstrated as both likely and actual, a denial of protection against this car use is a denial of Westward's acknowledged trademark rights for precisely its campers and trailers.

It is simply a fiction to think that a user's goodwill in a mark is being protected *at all*, even in a specific industry, when his goods *of that very industry* are caused by a closely-related use to be supposed to be business-affiliated with the other user.

The whole concept of "limitation to its own industry" is thus seen to be illusory and unrealistic; and, being incompatible with the ultimate criteria of confusion-likelihood, it logically must yield to that test.

This denial of protection against a closely related and forewarned later-use is thus a denial of lawful protection on its own goods of its own industry; and regardless of how a Court rationalizes a denial of that admittedly-deserved protection, and particularly where the rationalization does not include one single case or authority less than 18 years old as to any point of substantive trademark law, its denial is a denial to Westward of its rights under the Fifth and Fourteenth Amendments; and is such a departure from logical process as to seem to require an exercise of this Court's power of supervision.

4. The Court Of Appeals Has Rendered A Decision In Conflict With Other Federal Decisions As To Supposed Defenses Of "Weak Mark" And "Third Party Uses," Further Confusing Substantive Trademark Law, For Those Defenses Are Not Based On Indiana Law.

As to the inter-related supposed-defenses of "weak mark" and "third party use," which are asserted as justifying the denial of protection here: The Court has used third party uses, which are the same *unconfusing* uses over which the Court says that Westward *does have* a legally protectable interest in the mark for its campers and trailers, to rule that Westward does *not* have a legally protectable interest in the mark *for precisely its campers and trailers.*

The inherent and illogical inconsistency of such a result is no doubt one of the reasons why modern trademark law has developed so as to effectively drop this "mark strength" test, at least where confusion is shown to be likely. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F2d 149, 153 (9th Cir. 1963). Even the 7th Circuit dropped and scoffed at the test of "mark strength" in *Americana* (350 F2d 609 at 611) where it found confusion to be of the usual type, relating to a registered mark. Yet here, to rule for Ford, the 7th Circuit resurrected a text and cases all 18 years old and incompatible with the ultimacy of the confusion-likelihood test, such as is illustrated by the *Restatement of Torts*, Sec. 717, 731.

Not only do these supposed-defenses ignore the ultimate criteria of likelihood of confusion; but unless they are recognized as inherently having to yield to the paramount consideration of confusion-likelihood, they belong only in the field of patent law inventiveness tests.

Further, there is just no logic whatever in permitting a later-comer to resurrect other uses, which the late-comer may never before have even heard of or thought much about, and which have concurrently existed with no likelihood of producing such confusion, as an escape for liability for the late-comer use which does produce confusion-likelihood.

In other words, Westward, having developed legally-recognized protectible rights on its own goods in spite of those non-confusing "third party" uses, cannot logically be denied the protection of law as to its same goods on the basis of these same "third party" uses; yet that illogical and inconsistent result is what is asserted in the Appellate Court's ruling.

The utter superficiality and unreality and non-applicability of the "weak mark" and "third party uses" supposed-defenses, in a forewarned "reverse confusion" situation such as here, where the later use is in such an extremely close field (both involving body-type overall vehicles rather than merely components), is illustrated by the following:

Suppose Westward's mark had been unquestionably technically "strong," an absolutely novel and coined word, let us say for example "ZYXLPH," never before used by any other on any other product, absolutely virgin-pure; and let us assume that every other detail of this entire "Mustang" controversy were the same except the mark was "ZYXLPH" instead of "Mustang."

In this "ZYXLPH" fact situation, who will deny that in all probability exactly the same or perhaps even *more* "reverse confusion" would have inevitably occurred as has occurred, by Ford's closely overlapping use? The

"weak mark" and "third party use" factors are thus seen to be not even relevant, in a close-use situation where confusion is likely. They are unrealistic, where confusion is likely, and they must yield to the control of the confusion-likelihood determination.

5. The Court Of Appeals Decision Is In Conflict With Basic Priciples Of Tort Law.

After all, here we have an industrial giant, with full knowledge of the victim and of the foreseeable effect on the victim, and with what must be recognized to have been in at least a reckless disregard of the jeopardy and consequences, engaging on an unprecedentedly massive scale with the identical term and in a closely related use to the established and expanding use of the smaller company, with no excuses such as descriptiveness, and with an infinite number of other marks to select from; and this has had the inevitable and foreseeable result of not only a reputation jeopardy but a major loss of identity on specifically Westward's campers and trailers, in a large effect a forced business-marriage which Westward did not want.

Even if there never had been any trademark protection ever before legally recognized, this should be held actionable on basic principles; for such a reckless and damaging course of action continually and without one reason demolishes Westward's goodwill, just as surely and inevitably and foreseeably as if Ford had stationed hundreds of men around the country, expressly proclaiming a Ford-affiliation to Westward's products.

6. The Court Of Appeals' Decision, While Asserting It Is Applying "Indiana Law," Tests A Nationwide Tort By A Rationale Which Is Not Based On Indiana Law, And Which Is Contrary In All Significant Respects To The Weight Of Authority Of Other Federal, State, And Treatise Authorities, And Which Yields An Unconstitutional Interpretation To Indiana Law.

The Appellate Court has been quite inconsistent in determining what it feels is the applicable Indiana law. It correctly sees that Indiana has not defined the boundaries of trademark protection; but then, quite inconsistently with logic, the Court proceeds to articulate for Indiana a standard of protectability substantially in departure from the ultimacy of the generally recognized confusion-likelihood test.

Moreover, the Court imposes into Indiana law, as a major part of its rationale in this case, defenses ("weak mark" and "third party usage") which find no basis in Indiana law.

A further reason to show how illogical it is for the Court to impose defenses into Indiana law which are at variance with the more protective confusion-likelihood tests of other jurisdictions are the facts that Ford's conduct has of course been nationwide, and the Indiana conflict of laws rule is that actionability is to be determined by the law of the jurisdiction of the activity challenged. (*Rekeweg v. Fed. Mut. Ins. Co.*, 324 F2d 150, 151, (7th Cir. 1963) c.d. 376 U.S. 943)

One would have thus expected that principles of comity and consistency would have persuaded the Court to determine Indiana law to be in line with the broad confusion-likelihood test of the cases which have been cited herein,

or that of other current-era authorities such as the *Restatement of Torts,* Tent. Draft No. 8, 1963, Sec. 717, pp. 53, 61; Sec. 731, pp. 103, 104.

Such errors as to an assertion of Indiana law, particularly in view of the nationwide nature of the tort and the general supremacy of the federal control by the Interstate Commerce Clause, and with no reason to bind Indiana with a protectability standard less than would be afforded by other jurisdiction and federal authorities, and, with the other errors of law already mentioned, give an unconstitutional interpretation to Indiana law, and thus violate the Fourteenth Amendment.

7. The Court Of Appeals Decision Further Confuses Substantive Trademark Law, Not Merely Of Indiana, By Imposing A Protectability-Standard For A Common Law Trademark Significantly Different From That Of A Federal Registration, Without Adequate Reason For The Distinction.

By so wholly ignoring the apparent greater protectability of a federal registration than that given here to a common law trademark, and not even looking to federal authorities or to the federal statute in even interpreting the Indiana law as to a nationwide tort, while at the same time expressly noting that Indiana law is silent on the points, the Court of Appeals has imposed upon common law trademarks, not merely of Indiana but elsewhere, a standard of protectability significantly less than that of the federal statute; and this has been not only without good reason, but as urged throughout this petition, has been against the generally-accepted basic rationale of trademark protection.

6. The Court Of Appeals Decision Still Further Confuses Substantive Trademark Law, Not Merely Of Indiana, By Relegating To The Whims Of A Single State The Nationwide Protectability Of A Clearly-Interstate Usage, Against Another Clearly-Interstate Usage.

There is nothing in the *Erie* case, or in the Court-cited *Pecheur* case of 1942, which requires a Federal Court to completely blindfold itself from the great weight of Federal and treatise rationale as to the protection to be made to the interstate commerce inherent in two clearly-national trademark usages, in a field in which the administration of a federal statute so clearly has developed past the stage of 18-year old cases by which the Court of Appeals has announced the Indiana law to be.

If the state-afforded protection for an interstate usage is given by the state to be at least substantially as much as that inherent in the basic rationale of federal trademark protection, perhaps the point is of only theoretical concern. But where the protectability-standard is so much weaker by a single state's law, the matter cannot, consistent with the Interstate Commerce Clause, be left to the whim of a single state.

Thus, an upholding of the Court of Appeals' archaeological determination of "Indiana law," considering the great disparity between the Indiana law as here determined, and the protectability-rationale elsewhere, seems obviously to require a re-examination of cases such as the 1942 *Pecheur*, by the United States Supreme Court.

CONCLUSION

In conclusion, it should perhaps be noted that even though Westward's federal registration has now been granted, and even though as argued herein the usual registration protectibility is more than that provided by the Court of Appeals here, it would be quite unrealistic for the Court to assume that our plea can be likely met by any hoped enforcement of the registration itself as to conduct of Ford occurring subsequent to the registration date of Sept. 5, 1967, rather than by this present action.

For obviously, to rely wholly on the future protectability of that registration imposes burdens substantially exceeding those of this action: (a) The registration had not issued at the time of the beginning, and in many respects the most-damaging time, of the tort, and thus it would have to be given retroactive effect in order to itself specifically control the 1964-1967 era; (b) Ford would no doubt assert this present action as *res judicata* as to the pre-1967 aspect; (c) Ford would no doubt assert that the Westward owners as of the 1967 issuance date had bought in after the Ford-caused confusion had begun and had continued, and that they had paid only a relatively little, for all ownership changes since the 1965 bankruptcy have indeed been made during the continuing financial trouble which the Ford "Mustang" entry has caused; and (d) For several reasons, it would be harder to prove specifics of actual monetary damages as to the post-issuance date than as to the pre-issuance date.

For the many reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners.

Of Counsel:

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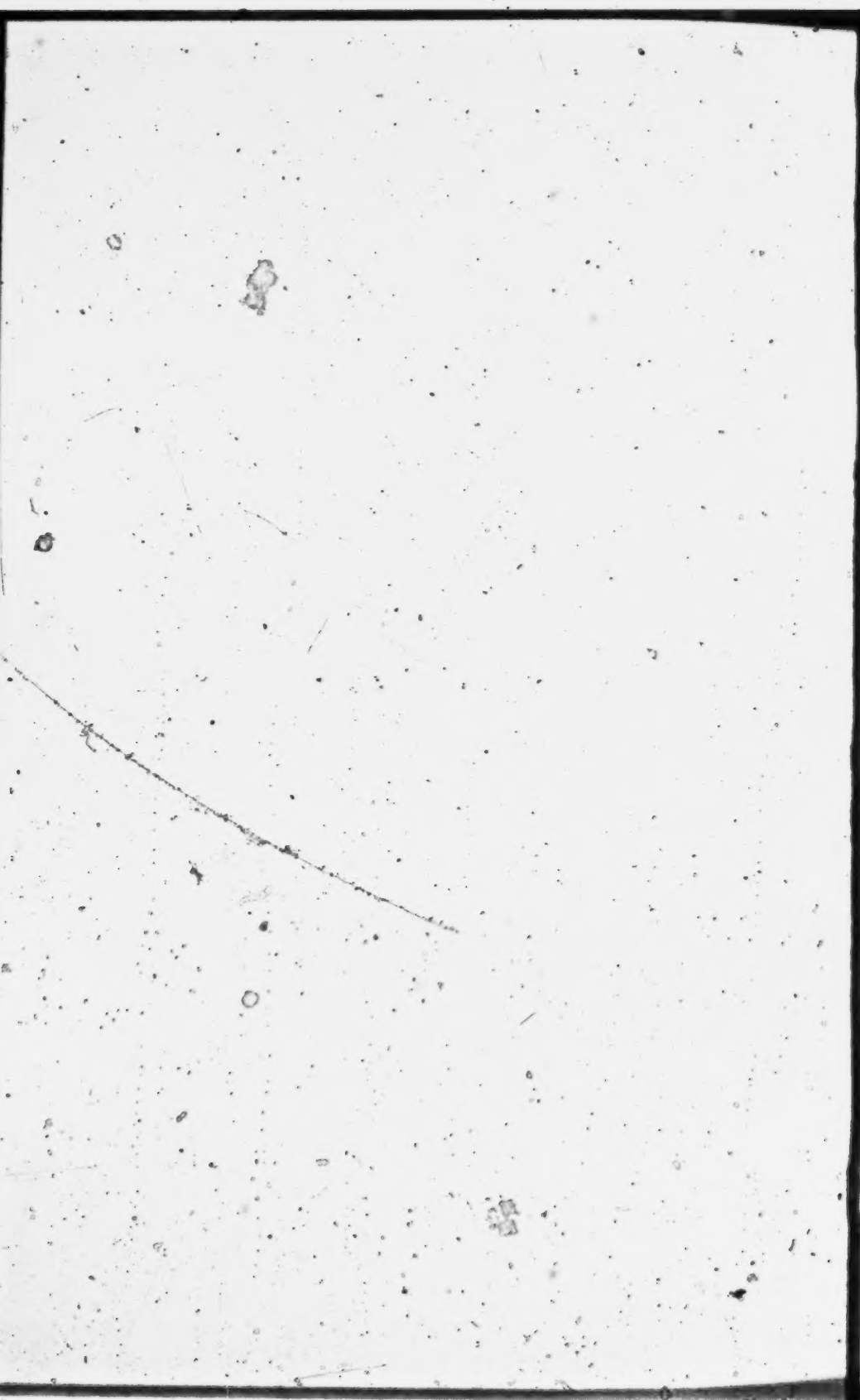
APPENDIX



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IN THE

Supreme Court of The United States

October Term, 1968

No. 1406

WESTWARD COACH MANUFACTURING COMPANY, INC., and RAY GRAINGER, Trustee in Bankruptcy of Westward Coach Manufacturing Company, Inc.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(IP 65-C-199)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The motion of the defendant for summary judgment on the complaint pursuant to Rule 56 (c) of the Rules of Civil Procedure, having been presented and the Court, having considered all of the showings of the defendant and plaintiffs and being duly advised, now enters its Memorandum Opinion thereon:

(H.I.)

The Court accordingly finds that the defendant is entitled, as a matter of law, to summary judgment on the complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DEGREED that the defendant's motion for summary judgment be and the same is hereby granted; that the plaintiffs have and recover nothing by their complaint, and that the defendant recover its costs and charges in its behalf expended.

Dated July 29, 1966.

/s/ Cale J. Holder
Judge, United States District Court
for the Southern District of Indiana

(IP 65-C-199)

MEMORANDUM OPINION

The plaintiff, Westward Coach Manufacturing Company, Inc., commenced its action on April 28, 1965, when it filed a three count complaint charging the defendant, Ford Motor Company, with infringement of an alleged common law trade-mark in count one; with unfair competition in count two; and with infringement of an Indiana statutory trade-mark in count three. Jurisdiction of the Court is alleged in each count of the complaint to be based upon diversity of citizenship and the amount in controversy exceeding, exclusive of interest and costs, the sum of $10,000.00. Judgment is requested in each count of

$3,000,000.00 for compensatory damages; for punitive damages; for an injunction to perpetually restrain defendant, directly and through its agents and dealers, from using the trade-mark MUSTANG with the representation of a charging horse in the State of Indiana, and throughout the world; for attorney fees, for costs of the action; and such other and further relief as is just.

ISSUES OF COMPLAINT AND ANSWER

The June 21, 1965 answer of the defendant, consisting of one defense to each of the three counts of the complaint, admitted and denied specific allegations of the complaint.

The alleged facts of count one of the complaint were realleged in counts two and three. The allegations of count one and the issue joined therewith by defendant's answer are as follows:

> The plaintiff alleged and the defendant admitted the allegations of rhetorical paragraphs one, two and three: that Westward Coach Manufacturing Company, Inc. was incorporated in the State of Indiana, with its principal place of business situated in the City of Elkhart, State of Indiana; that Ford Motor Company was incorporated in the State of Delaware, was admitted to do and was doing business in the Indianapolis Division of the United States District Court for the Southern District of Indiana; that the plaintiff and defendant were of diverse jurisdictions when the action was commenced; and the matter in controversy in the action exceeded, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000.00).
>
> The plaintiff alleged and the defendant denied the allegations of rhetorical paragraphs four through fourteen (except the matters in parenthesis) that

The alleged facts of count two of the complaint and the issues joined therewith by the defendant's answer are as follows:

> The plaintiff alleged and the defendant denied the allegations of rhetorical paragraph sixteen: that the defendant, by its production, advertising, and/or sale of automobiles under the mark MUSTANG and/or a representation of a charging horse, had engaged in unfair competition with the plaintiff and engaged in unfair business practices by unjustly appropriating to defendant's own use and using plaintiff's property right, to-wit; plaintiff's trade-marks, on goods closely related to plaintiff's goods, and in the same general class, to-wit; vehicles, and in unduly restricting the field in which plaintiff's trade-marks are accorded exclusiveness of use; and in thereby effectively blocking the natural expansion of plaintiff's business into the mobile home units of self-propelled type for which plaintiff could otherwise exclusively use the marks in which plaintiff has built up good will sales appeal.

The alleged facts of count three of the complaint and the issues joined therewith by the defendant's answer are as follows:

> The plaintiff alleged and the defendant denied the allegations of rhetorical paragraphs eighteen, nineteen, and twenty; that the plaintiff is the owner of trade-mark registration no. 5005-839, registered January 9, 1962, which was issued by the State of Indiana for utility coaches, vehicle-carried accommodations for campers and travelers, vans, and the like; that the scope of goods protected by the registration encompasses the defendant's alleged usage, and/or the scope extends to and includes the alleged usages by the defendant for the reason that the attributes of the defendant's automobile, and/or defendant, have been transferred to the plaintiff and plaintiff's mobile home units, and there was a re-

sulting confusion to the public by the usage of the same or similar marks on such closely related goods of the same general class of vehicles, and there has resulted an undue restriction of the field in which the plaintiff's registered trade-marks are accorded exclusiveness of use, and prevented the natural expansion of the plaintiff's business; that the defendant, by its production, advertising, and/or sale of its automobile under the mark MUSTANG, and/or representation of a charging horse, in the State of Indiana, has and is violating plaintiff's Indiana State Trade-Mark Registration, and the defendant infringed on the Indiana trade-mark rights of the plaintiff protected by such registration.

HISTORY OF ACTION

It was disclosed at a scheduled pre-trial conference on January 6, 1966 that the plaintiff had recently filed a reorganization proceeding under Chapter XI of the Bankruptcy Act in the South Bend Division of the United States District Court for the Northern District of Indiana as Bankruptcy Cause Number 6191. Thereafter, on February 4, 1966, Ray Grainger, Trustee of Westward Coach Manufacturing Co., Inc., appointed by that Court, petitioned this Court to be added as a party plaintiff as authorized and directed by that Court to do. The Trustee was added as a party plaintiff pursuant to an order entered February 8, 1966.

Ford Motor Company filed a counterclaim for a Declaratory Judgment against the original plaintiff on November 4, 1965 before the addition of the Trustee as a party. The counter-defendant moved on June 29, 1966 for permission to file its late reply.

Ford Motor Company filed a Motion for Summary Judgment on February 21, 1966 upon all counts of the

complaint and upon its counterclaim. On July 6, 1966, Ford Motor Company moved to withdraw that part of its Motion seeking Summary Judgment upon its counterclaim which was granted, and that part of the Motion is stricken.

The matter is submitted for the Court's ruling upon the defendant's February 21, 1966 Motion for Summary Judgment, as amended by the defendant on July 11, 1966, removing the issues of the counterclaim for Declaratory Judgment from the Summary Judgment Motion; the evidence offered in support and in opposition to the Motion, the supporting defendant's brief filed February 21, 1966; the plaintiffs' answer brief in opposition filed March 11, 1966; the defendant's reply brief filed April 7, 1966; the plaintiffs' supplemental answer brief in opposition filed June 8, 1966; and the defendant's supplemental reply brief filed June 21, 1966. The parties waived oral argument upon the issues of the Motion. The Court being advised in the matter submits this memorandum ruling.

RECORD OF TENDERED EVIDENCE SUPPORTING AND OPPOSING MOTION FOR SUMMARY JUDGMENT

The defendant submitted in report of its Motion for Summary Judgment upon the issues of the three counts of the plaintiffs' complaint and the answer thereto the following evidence:

A) Defendant's interrogatories, numbered 1 through 68, filed October 11, 1965, and the plaintiff's, Westward Coach Manufacturing Company, Inc.'s, answers thereto filed November 30, 1965.

B) Defendant's request for admissions, numbered 1 through 35, filed October 11, 1965, and the plaintiff's

Westward Coach Manufacturing Company, Inc.'s, responses thereto filed October 25, 1965, and the amended responses to requests, numbered 22 and 26, filed November 24, 1965.

C) Defendant's exhibits, numbered 1 through 312, representing copies of trade-marks issued using the mark MUSTANG and/or the representation of a horse.

D) Defendant's exhibit 313 representing the January 9, 1962 application of E. Edward Enochs, doing business under the firm name of Westward Coach and Sales Manufacturing Co., for the registration of the trademark in issue and the certificate of registration issued thereon on January 9, 1962, by the Secretary of the State of Indiana pursuant to Chapter 174 of the Acts of 1955 as amended Chapter 256 of the Acts of 1959.

E) Defendant's exhibit 314 representing Westward Coach Manufacturing Company, Inc.'s November 28, 1962 application for a United States trade-mark registration of MUSTANG and a representation of a horse with copies of all proceedings upon such pending application before the United States Patent Office.

F) Defendant's exhibit 315 representing the affidavit of Robert J. Fisher, Advertising Manager for the Ford Division of Ford Motor Company, with the following sub-exhibits: A, B1 through B66, C1 through C84, D1 through D6, E1 through E17, F1 through F3, and G1 through G2.

G) Defendant's exhibit 316 representing the affidavit of Gordon B. MacKenzie, General Sales Manager for the Ford Division of Ford Motor Company, with sub-exhibits A and B attached.

H) Defendant's exhibit 317 representing the affidavit of P. E. Sharp, Manager of the Price Analysis Department of Ford Motor Company with a sub-exhibit lettered A attached.

I) Defendant's exhibit 318 representing the affidavit of R. E. Dikeman, Account Executive of R. L. Polk and Co., with a sub-exhibit lettered A attached.

J) Defendant's exhibit 319 representing a transcript of the January 10, 1966 proceedings for an arrangement in bankruptcy in the Matter of Westward Coach Manufacturing Company, Inc., Debtor, before the United States District Court for the Northern District of Indiana, South Bend Division, consisting of the testimony of E. Edward Enochs, president of the debtor corporation; testimony of LaMar Edward Hughes, accountant for the purchasers and an investor; Raymond J. Grainger, receiver of the debtor corporation; Joseph O. Frost, accountant for the debtor corporation; and Thomas M. Tuttle, an investor seeking to salvage the debtor corporation.

K) Defendant's exhibit 320 representing the affidavit of F. H. Bigelow, Recretional (sic) Vehicle Specialist for the Ford Division of Ford Motor Company, (with sub-exhibits B1, B2, B3 and B4 attached).

L) Defendant's unnumbered exhibit being a transcript of a deposition of E. Edward Enochs, then president of the plaintiff corporation, taken on July 22, 1965, with the following deposition exhibits, numbered 1 through 288, and sub-exhibits thereof.

M) Transcript of a deposition of Frank Rizzo, then sales manager of plaintiff, taken on July 22, 1965, with deposition exhibits numbered 1 and 2.

The plaintiffs submitted in opposition to the defendant's Motion for Summary Judgment the following evidence:

N) Transcript of a deposition of Frank Rizzo, then sales manager of plaintiff, taken on July 22, 1965, with the appended exhibits numbered 1 and 2. (Same deposition was offered by defendant).

O) Transcript of a deposition of E. Edward Enochs, then president of the plaintiff corporation, taken on July 22, 1965, with the following deposition exhibits appended and numbered 1 through 288 and sub-exhibits thereof. (Same deposition was offered by defendant.)

P) Plaintiffs' exhibit A representing the April 29, 1966 letter affidavit of E. S. Barker, president of Trailer Village Sales, Inc. of Kittery, Maine, then a dealer in plaintiffs' products.

Q) Plaintiffs' exhibit B representing the letter affidavit of April 25, 1966 and sworn to on May 3, 1966 of Costa Markos d/b/a Queen City Trailer Sales of Denver, Colorado, who had been a dealer in plaintiffs' products.

R) Plaintiffs' exhibit C representing the letter affidavit, dated April 14, 1966, and sworn to on April 15, 1966, of J. Harold Daniels d/b/a White Star Distributors of Tonawanda, New York, then a dealer in plaintiffs' products.

S) Plaintiffs' unnumbered exhibit representing the letter affidavit dated October 3, 1965 of Victor Wesselhoft, the plaintiffs' advertising agent for five years.

T) Plaintiffs' unnumbered exhibit representing the letter affidavit dated May 7, 1966 of A. Armond Lynn,

General Manager of Hill Top Auto Sales of Cincinnati, Ohio.

U) Plaintiffs' unnumbered exhibit representing the letter affidavit dated May 6, 1966 of James E. Lyboldt, a representative of Palmer's Granite Garage, Inc. of Fulton, New York, a dealer in plaintiffs' products.

V) Plaintiffs' unnumbered exhibit representing the affidavit dated April 20, 1966 and the undated unsworn supplement thereto of Howard Johnson, owner and manager of Johnson Trailer Sales of Kokomo, Indiana, a competitor dealer of products other than plaintiffs' products.

W) Plaintiffs' unnumbered exhibit representing the affidavit dated April 28, 1966 of Spencer Galbreath, owner and operator of Travel Trailer Sales of Indianapolis, Indiana, a former dealer in plaintiffs' products.

X) Plaintiffs' unnumbered exhibit representing the affidavit dated May 4, 1966 of Ivo Heckaman, president of Heckaman Manufacturing Inc. of Nappanee, Indiana, a competitor of plaintiffs, with an appended unnumbered sub-exhibit.

Y) Plaintiffs' unnumbered exhibit representing the affidavit dated April 28, 1966 of Ebert D. (Rex) Cox, Jr., executive director of Indiana Mobile Home Association of Indianapolis, Indiana, a trade association in Indiana involving recreational vehicles including "campers" and "travel trailers", with an appended unnumbered exhibit.

Z) Plaintiffs' unnumbered exhibit representing the affidavit dated May 8, 1966 of R. C. Miesel, owner of Buck's Mobile Homes, a retail mobile home sales agency of Plainfield, Indiana, a competitor dealer of products other than plaintiffs' products.

AA) Plaintiffs' unnumbered exhibit representing the affidavit dated April 29, 1966 of James H. Baker, sales manager of Johnson Chevrolet of Indianapolis, Indiana, a competitor dealer of products other than plaintiffs' and defendant's products, with an appended sub-exhibit "A".

BB) Plaintiffs' unnumbered exhibit representing the affidavit dated May 2, 1966 of Lillian Larrabee former officer manager of plaintiff.

CC) Plaintiffs' unnumbered exhibit representing the affidavit dated April 29, 1966 of Bernice R. Enochs, former secretary-treasurer of plaintiff.

DD) Plaintiffs' unnumbered exhibit representing the supplemental affidavit dated April 29, 1966 of Bernice R. Enochs, former secretary-treasurer of plaintiff.

EE) Plaintiffs' unnumbered exhibit (designated as affidavit "A" of affiant) representing the first of a series of affidavits dated May 9, 1966 of Robert A. Spray, attorney for the plaintiffs, with appended unnumbered eight sub-exhibits of letters received by Mr. Spray upon his solicitation.

FF) Plaintiffs' unnumbered exhibit (designated as affidavit "B" of affiant representing the second of a series of affidavits dated May 12, 1966 of Robert A. Spray, attorney for the plaintiffs, with appended sub-exhibits lettered A, B, C, D, E, F, G, H and I.

GG) Plaintiffs' unnumbered exhibit (designated as affidavit "C" of affiant) representing the third of a series of affidavits dated May 16, 1966 of Robert A. Spray, attorney for the plaintiffs, with appended sub-exhibits lettered A, B, C, D, E, F, G and H.

HH) Plaintiffs' unnumbered exhibit (designated as affidavit "D" of affiant) representing the fourth and last of a series of affidavits dated May 24, 1966 of Robert A. Spray, attorney for the plaintiffs, with an appended unnumbered sub-exhibit and with an appended sub-exhibit lettered A.

II) Plaintiffs' unnumbered exhibit (designated as affidavit "A" of affiant) representing the first of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

JJ) Plaintiffs' unnumbered exhibit (designated as affidavit "B" of affiant) representing the second of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

KK) Plaintiffs' unnumbered exhibit (designated as affidavit "C" of affiant) representing the third of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

LL) Plaintiffs' unnumbered exhibit (designated as affidavit "D" of affiant) representing the fourth of a series of affidavits dated April 29, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E and F.

MM) Plaintiffs' unnumbered exhibit designated as affidavit "E" of affiant) representing the fifth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B and C.

NN) Plaintiffs' unnumbered exhibit (designated as affidavit "F" of affiant) representing the sixth of a series of affidavits dated May 9, 1966 of E. Edward

Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E, F, G, H, J, K, L, M and another M. (While the affidavit refers to a sub-exhibit "I" such exhibit was not attached.)

OO) Plaintiffs' unnumbered exhibit (designated as affidavit "G" of affiant) representing the seventh of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with an appended sub-exhibit lettered A, and two appended sub-unnumbered exhibits.

PP) Plaintiffs' unnumbered exhibit (designated as affidavit "H" of affiant) representing the eighth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with an appended sub-exhibit lettered A.

QQ) Plaintiffs' unnumbered exhibit (designated as affidavit "I" of affiant) representing the ninth of a series of affidavits dated May 6, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits letterhead B, C, D, E, F, G, H, I, J and K. (No exhibit "A" was attached.)

RR) Plaintiffs' unnumbered exhibit (designated as affidavit "J" of affiant) representing the tenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

SS) Plaintiffs' unnumbered exhibit (designated as affidavit "K" of affiant) representing the eleventh of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

TT) Plaintiffs' unnumbered exhibit (designated as affidavit "L" of affiant) representing the twelfth of a series of affidavits dated May 9, 1966 of E. Edward

Enochs, former president of plaintiff, with an appended sub-exhibit lettered L. (No qther exhibits were attached.)

UU) Plaintiffs' unnumbered exhibit (designated as affidavit "M" of affiant) representing the thirteenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, M and N. (No other exhibits were attached.)

VV) Plaintiffs' unnumbered exhibit (designated as affidavit "N" of affiant) representing the fourteenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with an appended unnumbered sub-exhibit and appended sub-exhibits lettered A, B, C, D and E.

WW) Plaintiffs' unnumbered exhibit (designated as affidavit "O" of affiant) representing the fifteenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff.

XX) Plaintiffs' unnumbered exhibit (designated as affidavit "P" of affiant) representing the sixteenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with an appended sub-exhibit lettered A.

YY) Plaintiffs' unnumbered exhibit (designated as affidavit "Q" of affiant) representing the seventeenth of a series of affidavits dated May 9, 1966, of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E and F.

ZZ) Plaintiffs' unnumbered exhibit (designated as affidavit "R" of affiant) representing the eighteenth of a series of affidavits dated May 9, 1966 of E. Edward

Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T and U.

AAA) Plaintiffs' unnumbered exhibit (designated as affidavit "S" of affiant) representing the nineteenth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E, and another E, F, G and H.

BBB) Plaintiffs' unnumbered exhibit (designated as affidavit "T" of affiant) representing the twentieth of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, A1, A2, B and C.

CCC) Plaintiffs' unnumbered exhibit (designated as affidavit "U" of affiant) representing the twenty-first of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q and R.

DDD) Plaintiffs' unnumbered exhibit (designated as affidavit "V" of affiant) representing the twenty-second of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with appended sub-exhibits lettered A, B, C, D, E, F, G, H, I, J, K, L, M, O, P, Q, R, S, T, U, V, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, and KK. (There was no exhibit "N" attached.)

EEE) Plaintiffs' unnumbered exhibit (designated as affidavit "W" of affiant) representing the twenty-third and last of a series of affidavits dated May 9, 1966 of E. Edward Enochs, former president of plaintiff, with

appended sub-exhibits lettered A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S and T.

FFF) Plaintiffs' unnumbered exhibit representing plaintiffs' requests for admissions, numbered 13, 14, 21, 22, 52, 59, 60, 63, 64, 65, 67, 72, 79 and 80, filed January 4, 1966 and the defendant's responses thereto filed May 16, 1966.

GGG) Plaintiffs' unnumbered exhibit representing plaintiffs' interrogatories, numbered 1, 2, 27, 28, 62, 73, 74 and 77, filed January 4, 1966 and the defendant's answers thereto filed May 16, 1966.

FACTS

(A) History of MUSTANG and Horse Depiction

The word MUSTANG is not a distinctive or novel word and was not originated by the plaintiffs, their predecessor user, or the defendant. It is a noun identifying the wild or half-wide horses of the Southwest United States and Mexico descended from the stock introduced by the Spanish conquistadores. It was derived from the Spanish word "mestengo", an adjective, meaning "wild, having no conqueror". The word, as so defined, has been in common usage for over one hundred and fifty years. In 1380, a small kindgom of Nepal was founded and named MUSTANG. Since the war among the states, a United States Naval Officer who had been promoted from the enlisted classification was proudly dubbed a MUSTANG. The Southern Methodist University football team is popularly referred to as the MUSTANGS. During World War II, a famous allied attack plane was known the world over as the MUSTANG. The word was used as the name of many products before and since the plaintiff

adopted its use in the year 1960 including tractors, motorcycles, engines, trucks manufactured in England and Japan, automobile parts, cranes and clothing. It has been registered in the United States Patent Office alone and in combination with the representation of a horse as a trademark at least thirty-four times for a variety of products. It was federally registered for trailers and truck trailers prior to plaintiff's use. Plaintiff filed an application on November 28, 1962 with the United States Patent Office for registration of the name MUSTANG and a representation of a horse and before it could proceed with such application it was required to institute proceedings for the cancellation of the mark previously registered by the United States Patent Office to a trailer manufacturer on the grounds of abandonment. That application is still pending since it is opposed by White Motor Company who claims the mark as federally registered previously and in use and from whom plaintiff purchased and used for a long time on plaintiff's products the White Motor Company chrome MUSTANG hood ornament with the name "White" upon the depicted horse. White Motor Company's registered mark is the word MUSTANG for its truck engines and it is displayed prominently on the hoods of the White vehicles.

The representation of a horse in trade-marks in some form had been in use before the predecessors of plaintiffs' use and is still used on hundred of products as exampled by some two hundred and sixty-six trade-mark registrations in evidence, ten of which included the word MUSTANG. Porsche and Ferrari automobiles sold in the United States use the horse representation thereon, both before and since plaintiffs' use.

(B) Plaintiffs' Products, Adoption of and Use of Mark

E. Edward Enochs was first gainfully employed in the trailer industry as a salesman for a retail dealer in the year 1954 and continued in the retail business of the industry as a salesman of dealers and as a dealer until 1959 and early 1960. Commencing in 1959 in Phoenix, Arizona, he claims he started and completed designing in eight months a unique new trailer of wood construction that would be strong and rugged, that would be equipped with modern conveniences with livable features and a quality far superior in appearance and more modern utility features than the trailers then marketed. In casting about for a name to associate with his new product, he settled upon the name MUSTANG with the representation of a horse because his product was a wild design and idea in the industry at that time. He was then aware of the dictionary definition of the word MUSTANG and the reputation of the fighter plane of World War II named MUSTANG. Mr. Enochs built the first trailer of such design in Lafayette, Indiana, and later contracted for the construction of his designed trailers with independent contractors which practice continued until September of 1962. The business was moved to Elkhart, Indiana, in late 1960, or early 1961, and commencing in 1962 the plaintiffs commenced and have continuously since manufactured Mr. Enochs' designed trailers. Mr. Enochs' early undertakings were in his own name and later the business was conducted by Mr. Enochs as the owner in the name of Westward Coach Manufacturing Company. The business and assets were transferred to the plaintiff, Westward Coach Manufacturing Company, Inc., an Indiana corporation, when it was incorporated September 21, 1962. Plaintiffs have not applied to do business in any other state. Mr. Enochs and members of his family, up to the time

of the filing of this action, were the sole stockholders of the plaintiff corporation. Mr. Enochs, the principal stockholder, continued to be the principal executive and driving force of the corporation and members of his family participated in its developing business.

The trade-mark claimed by the plaintiffs was first used on their products in September of 1960. It has been continuously used since that time by plaintiffs. Plaintiffs' predecessor applied for an Indiana State Trade-Mark registration on January 9, 1962, and received Indiana State Trade-Mark Registration No. 5005-839 dated January 9, 1962 for the word MUSTANG and a pictorial representation of a leaping horse, the goods being identified in the registration as utility coaches, vehicle-carried accommodation for campers or travelers, vans and the like. No other state was requested to grant such a registration. Plaintiff made application for Federal trademark registration on November 28, 1962 (Serial No. 158,116) for the word MUSTANG and a pictorial representation of a leaping horse, the goods sought to be covered were utility coaches, vans, vehicle-carried accommodation for campers and travelers. The goods were changed during prosecution of the application to utility van bodies mountable on pick-up trucks and small trucks for providing trailer-type housing and storage accommodations for travelers and sportsmen, coach bodies known as campers for providing such accommodation and mountable on an associated vehicle or carrying unit such as a truck or boat unit (pontoon frame) and trailers. The United States Patent Office has not granted the application although that office, by its action letter of November 2, 1964, stated that the application appears to be entitled to registration and was duly published in its official Gazette. The appli-

cation is opposed by the White Motor Company, No. 44,753, whose filed opposition is pending. The White Motor Company has never claimed that the use of the mark by the plaintiffs was an infringement of its rights. The plaintiffs and their predecessor duly notified any known user of their mark in the trailer industry and instituted litigation against those who persisted in doing so except the White Motor Company.

The trailer industry, in which Plaintiffs' line of business is classified, manufactures to order and sells the products wholesale to dealers who retail them at suggested markup prices to the ultimate consumer. There are some direct sales by the manufacturer to the consumer. The products of the industry comprise a unit equipped for human habitation, temporarily or permanently, and are equipped to be readily moved from place to place, although the product may be equipped and adapted to other uses. There are several types of trailers, the sport types being the "pick-up camper trailer" and the "travel trailer"; the permanent type known as the "mobile home"; and the "motor home" which is possibly a compromise between the use of the "camper" and "mobile home" types. The "pick-up camper trailer" has no wheels but is generally transported by being carried on the bed of one and one-half ton pick-up motor trucks manufactured by the automotive industry made possible by the trailer manufacturers constructing trailers to the size of the motor truck bed. The "travel trailer" is usually larger than the "pick-up camper"; it has wheels but is transported by placing a device on the rear of a passenger automobile or motor truck, called a "hitch", manufactured by the automotive industry, and by this means is transported by pulling or towing of the trailer. It is adapted principally

for touring. The "mobile home trailer" is similar to the "travel trailer" except it is usually larger, for more permanent use as a dwelling, is less desirable for touring because of its size yet has the mobile feature of the trailer for relocation when desired. The "motor home trailer" is a trailer permanently attached to a motored chassis and is principally adapted for touring purposes. There are other sub-types of these trailers. The plaintiffs and their predecessor, while classified in the trailer industry, were new in the industry and had the following sales and production record:

Year	Gross Sales—Units of Trailers, All Names with Horse Emblem	
1960	$ 33,467.00	20 Units of camper trailers
1961	$183,744.45	112 Units of camper trailers
1962	$280,385.83	176 Units (174 camper and 2 travel trailers)
1963	$414,399.00	319 Units (127 camper and 92 travel trailers)
1964	$592,166.00	308 Units (94 camper and 214 travel trailers)
1965	$794,116.00	393 Units (62 camper and 331 travel trailers)

The sales and production record of plaintiffs and their predecessors with the claimed expense of advertising developing and which resulted from the use of the mark are as follows:

MUSTANG Products

Year-Gross Sales	Number Trailers	Adv. Exp.
1960 $ 31,467.00	20 camper trailers	$ 2,899.33
1961 $176,069.00	107 camper trailers	$11,256.91
1962 $248,778.00	123 camper trailers 3 travel trailers	$14,244.45
1963 $366,227.00	91 camper trailers 79 travel trailers	$22,407.10
1964 $307,801.00	66 camper trailers 90 travel trailers	$42,953.70
1965 $696,786.00	47 camper trailers 239 travel trailers	$40,185.81

The plaintiff has plans to manufacture and sell trailers of all types and did manufacture a few other types. He showed them as well as disclosed drawings of types other than those produced and sold (the camper and travel trailer types). The plaintiff's production plant and office was situated on four and one-half acres of land. The real estate and plant facilities of plaintiff are leased from E. Edward Enochs and wife. It employed fifty men. It undertook the expansion of the manufacturing plant in 1964 to four times the plant capacity of 1963 so that the plant thereafter had a seven hundred to eight hundred unit production capacity per year. The peak demand, experience taught the plaintiff, was in good weather months of March, April, May and June as weather affects sales. After the expansion, the production of units dropped below the 1963 production records but in 1965 production exceeded the 1963 and 1964 records. The plaintiff used various names on its products such as "MUSTANG", "MUS-

TANG with PENTHOUSE", "PALOMINO", "STUD", "STALLION", "COLT" and "PINTO". All, except MUSTANG, were used on economy models. The MUSTANG mark with the representation of a horse has been predominantly used and advertised on plaintiffs' and their predecessor's products throughout their existence in the industry. The design of the horse used on the products differed from one design by plaintiff's advertising agent, Victor Wessolhoft, to the White Motor Company design and to one furnished by a supplier. It was affixed in different manners, chrome and plastic replicas, decals and paintings. Plaintiffs' horse representation is different than any horse representation used by the defendant. Plaintiffs and their predecessor have about seventy to eighty competitors in the industry, that is competitors in the sense that they were manufacturers of trailers of varying qualities, design and price. The plaintiff's products were wholesale priced from $1,995.00 to $2,600.00 and to $2,895.00. Only the aluminum trailers manufactured by two or three competitors were priced higher than plaintiff's trailers. Plaintiff's MUSTANG self-contained models (fully equipped) were wholesale priced at $2,395.00. Plaintiff's customers were primarily dealers numbering from one hundred to one hundred twenty-five, none of whom were franchised. Some of these dealers were also in the motor vehicle (truck and passenger automobile) sales business scattered in some states but primarily in the midwest. Plaintiff's potential future market appeared to be new of used car dealers of any make automobile. Plaintiff's product was and is available for use by the ultimate purchaser with any motor vehicle of any manufacturer and will continue to be the same in the potential future market. The plaintiff does not build motor vehicles and has no plans to do so. The plaintiff had plans to assemble

his constructed trailer unit onto a motored chassis purchased from any automobile manufacturer.

(C) Defendant's Products, Adoption and Use of the Trade-Mark

The defendant is a pioneer in the automotive industry in the manufacture and sale of truck and passenger vehicles. Its passenger vehicles are popularly known as Ford, Mercury and Lincoln. These models are further distinguished by secondary names of Thunderbird, Galaxie, Fairlane, Falcon, Mustang and Continental. Other competing manufacturers in the automotive industry follow the same general plan of the use of model names and secondary names. The defendant manufactures and sells chassis, trucks and passenger automobiles that are convertible for use in the trailer industry or by the ultimate user of a trailer of all kinds. The defendant does not manufacture or sell the trailer products of the industry to which plaintiffs are affiliated and defendant has no plans to do so. Some other members of the automotive industry have entered the trailer field in competition with plaintiffs. Defendant does not manufacture and sell the converting material necessary to make a trailer use of its automotive products but leaves such to the trailer industry and other industries. The trailer industry, including plaintiffs' business and their customers, is dependent upon the products of the automotive industry, including defendant's business, to provide mobility for the full use of the trailer by the user. Thus, there is a common market of users and dealers for the automotive and trailer industries. The defendant, as does the automotive industry, markets its products through independent franchised distributors and dealers throughout the United States who advertise and sell the new products of defendant and advertise and sell

the trade-in used products of all automotive manufacturers. The automotive dealers also buy, advertise and sell new and used trailers as well as other products.

The defendant, as do the other members of the automotive industry, advertises extensively its automotive products. The potential and present markets of the automotive industry are far greater than that of the trailer industry. Included in the advertising of defendant is the communication directed to the potential and present trailer owner of the adaption of its products to use in that field. Defendant has engaged in joint promotion with trailer manufacturers and at one time accepted the proposal of plaintiff's former sales manager for a joint promotion that was not consummated. Plaintiff's former president was a member of an awards committee of a trailer trade association and he personally approved of the committee's bestowal of an award to defendant for its outstanding advertising promotion beneficial to the trailer industry. The defendant does not manufacture, or sell, or advertise any unit of its products under the secondary name of MUSTANG depicting a horse which is convertible to the use of a trailer other than as a towing facility for the product of the trailer industry. The defendant, as do others in the automotive industry, provides a written warranty of its products, including its MUSTANG automobile, to the ultimate purchaser and user when the automobile is acquired from the dealer.

The massive advertising by the defendant and of its franchised distributors and dealers of defendant's products, including the MUSTANG automobile, together with the practice of the delivering of the written warranty to buyers clearly communicated at all times in question beyond any doubt to the public that the defendant was

the manufacturer, seller and warrantor of the MUSTANG automobile. The force of the massive advertising left no doubt in the public mind of the defendant's origination of the MUSTANG automobile even if the public was in the past or in the future became acquainted with the extensive history of prior use of the name MUSTANG accompanied by the representation of a horse by many other manufacturers with their many products. The public has never been, is not now, nor ever will or could be confused, or misled, or deceived by the defendant in the use of the name MUSTANG, accompanied by a representation of a horse, that any one other than the defendant was the originator, seller and warrantor of the MUSTANG automobile. There is no likelihood that the public has been, is now, ever will or could be confused over whether or not the plaintiffs were, or are the originators, sellers and warrantors of the MUSTANG automobile.

During the year 1962, the defendant manufactured an experimental economy sports vehicle which it named MUSTANG. It was not produced for sale but was displayed at vehicle shows. The plaintiff, on December 10, 1962, notified the defendant of defendant's use of its trade-mark which plaintiff had been using since September of 1960 with trailers and requested defendant, among other matters, to honor its trade-mark. The defendant acknowledged plaintiff's protesting letter and among other matters stated it was a premature accusation of invasion of rights as the use of the name was on a displayed vehicle which was not in production. In 1964, the defendant went into the mass production and sale of the vehicle with secondary name of MUSTANG accompanied by the representation of a horse. It is classed as a sports vehicle priced from the low $2,000.00 into the $3,000.00 price

depending upon the choice of the purchaser of extra equipment. The production and sale was accompanied by an immediate $6,000,000.00 advertising program and promotion program. Because of such programs, there was no doubt on the public's part as to whom originated the automobile from the time it was marketed. Since such initial production, another $10,000,000.00 has been expended by the defendant in advertising and promotion programs of its automobile and the secondary Ford name of MUSTANG accompanied by the representation of a horse. Because of such continued programs, there has been no change of mind on the public's part as to whom originated the automobile. After notifying the defendant, on April 9, 1965, of its claim of infringement, the plaintiff commenced this action on April 28, 1965.

While the name MUSTANG, as used by the defendant, is the same word as that used by the plaintiffs, it is presented and displayed differently than as used by the plaintiffs and while the representation of a horse alone or accompanied by the name MUSTANG as used by the defendant is different than the three used by the plaintiffs and is presented and displayed differently by the defendant than as used by the plaintiffs, the mark is substantially that as used by the plaintiffs and the many others who enjoyed prior use with many products.

LAW OF THE CASE

The plaintiffs' Indiana and common law trade-mark is limited to its use with the products of the trailer industry. Plaintiffs have no trade-mark rights thereunder so far as its use with the automotive industry products with which defendant is identified. The defendant is not a competitor of plaintiffs in the trailer business and defendant's use

of the name MUSTANG with the representation of a horse with its automotive products is not infringing plaintiffs' Indiana and common law mark as so limited to the trailer industry.

The plaintiffs' trade-mark is limited because it is not an original creation (coined or fanciful name) of plaintiffs as disclosed by the recited facts. It was limited to the secondary meaning acquired by plaintiffs' use and registered declared use thereof. The secondary meaning to the word MUSTANG and the representation of a horse therewith as used by plaintiffs was acquired in the trailer industry and market despite the many uses thereof by others as disclosed by the recited facts. Because of the nature of the Summary Judgment Proceeding in this posture of the case, the fact cannot be questioned that plaintiffs' mark had acquired such secondary meaning with small expenditures in promotion and advertising within the short time of approximately two years before defendant displayed its first use and approximately three years and four months before the defendant began to use the MUSTANG name and horse representation in production of automobiles which mark was old and shared by many others on a wide variety of products. The plaintiffs cannot extend their weak mark beyond the secondary meaning that it had acquired.

The defendant has avoided any claim of confusion of origin of its automotive product by immediately and continually informing the public that the MUSTANG automobile was a product of defendant. From the outset of the MUSTANG automobile's production it has acquired a secondary meaning in the automobile industry and in that market. There is no deception of the public or likelihood of public confusion, or the palming off of defend-

ant's product upon the good name, or service, or other attributes of plaintiffs' enterprise that it may have acquired. The public is informed that the MUSTANG automobile is a product of defendant.

Before reaching a decision on plaintiffs' claim of defendant's dilution of plaintiffs' property in the mark, there must be a fair appraisal of what was plaintiffs' property. The evidence discloses, when stripped of the adjectives of accusation culminating in a demand of $3,000,000.00 damages which tend to embellish the true status of plaintiffs' property before the alleged dilution, that plaintiffs' predecessor first used the public property of a dictionary word MUSTANG with a horse on a hand-made trailer in September 1960; when the name belonging to the public was chosen it was widely used as a mark in a variety of fields and many of which were Federal trade-mark registrations; the property value in the mark was developed, plaintiffs' claim, in a little over two years by furnishing the trailer market with 253 trailers using the mark, all but three of which were the smaller trailer campers (20 in 1960 grossing $31,467.00; 107 in 1961 grossing $176,069.00; and 126 in 1962 grossing $248,778.00); the property value plaintiffs claim in the mark was also developed in a little over two years by advertising and promotional expenditures of $28,400.69 ($2,899.33 in 1960; $11,256.91 in 1961; and $14,244.45 in 1962); by the end of 1962 plaintiffs' predecessor inequitably and ambitiously overclaimed its property interest in the mark not only in the trailer ind stry but also claimed it extended to the automotive industry products when the defendant first displayed its intended use of the name on its new sports automobile; thereafter the property value in the mark further developed plaintiffs' claim by furnishing the

trailer market with 326 trailers which used the mark (91 camper trailers and 79 travel trailers in 1963; and 11 camper trailers and 90 travel trailers in 1964); and during this same two year period the plaintiffs' predecessor was using various names identified with horses other than MUSTANG on 301 additional trailers which it furnished to the trailer market, the promotion cost of which is not disclosed; this further property value in the mark was developed by plaintiffs' claim of two years expenditures for advertising and promotion of $65,360.80 ($22,407.10 in 1963; and $42,953.70 in 1964). The defendant, in 1964, commenced the production and sale of the MUSTANG automobile with massive advertising and promotion thereof; the plaintiffs again inequitably and ambitiously overclaimed their property interest in the mark by requesting defendant to cease use of the name MUSTANG and the horse emblem and with renewed fervor they present their claims in this action. It is uncertain as to when the plaintiffs' mark matured from a dictionary publicly possessed name into distinctive property of plaintiffs. There is a difference of opinion as to whether the defendant has and is violating plaintiffs' rights, as charged in this action, between the former executives and stockholders and the present executives and stockholders of plaintiff corporation. Mr. Thomas M. Tuttle testified under oath as follows:

"Q. May I ask you, from what has been discussed earlier, did you give any consideration to the question of what, if any, value should be attached to the trademark of the word 'Mustang,' and the lawsuit that was pending for damages for an alleged infringement?

A. In regard to the lawsuit, we did not want any part of this lawsuit, not even 10 per cent. This

was the only arrangement that could be made out whereby we could acquire this company. We had to take it under a 'Chapter XI,' which, of course, is very expensive, and we are paying for this expense, and we didn't necessarily want to go this way, but Mr. Enochs' attorneys advised him that if the company was not a going concern, and coaches were not produced or made, that his lawsuit would be jeopardized. Therefore, it was worked out that he retain 90 per cent, and that the 10 per cent that we retain would be just an indication factor to the Court that the company was still operating. We couldn't care less about the suit that he has with the Ford Motor Company. We feel it is worthless, and we are in it to make trailers, and we are not in it to make some money on a lawsuit.

Q. Is that, then, your understanding of the reason for this Chapter XI proceeding, the reason being that it was the only way by which there could be a set off to Mr. Enochs, this right under this lawsuit?

A. That was my understanding, and that is the reason we are here under Chapter XI. We tried to buy it outright and form a different corporation. That was our original intention, and we had to go under Chapter XI. Our attorney advised us from the standpoint that we could eliminate any liabilities; if we didn't go under Chapter XI, we were going to form another corporation."

The foregoing are the factors, plus some blood, sweat and sacrifices of the former executive and principle stockholder, Mr. E. Edward Enochs, together with members of his family and a small, loyal group of employees, which are impossible even for them to describe, which developed the property right from a publicly possessed name MUS-

TANG with the trailer industry but in the midst of, surrounded by, or hedged in by many other users of the mark in other fields.

Faced with the inevitable conclusion of the limitation of the weak trade-mark under the facts of the case and the established fact that the defendant has educated the public of the defendant's origination of the MUSTANG automobile and thereby destroyed any claim of confusion as to such being plaintiffs' product, the plaintiffs ask the Court to apply the "dilution doctrine". Plaintiffs assert that because of the plaintiffs and defendant having a common market of trailer and automobile dealers and ultimate users the massive advertising of the defendant has diluted and whittled away the value of plaintiffs' mark. The plaintiffs assert that the defendant's advertising was so convincing that the ultimate purchaser believes plaintiffs' product is the defendant's, or that plaintiffs are affiliates of defendant, or that plaintiffs have unfairly taken defendant's name; also that plaintiffs while they may in some respects benefit from defendant's advertising they have also received the effects of all of defendant's past and future mistakes and reputation including the fact that defendant's MUSTANG is an economy automobile whereas plaintiffs' trailer is a prestige product; and also that the franchised dealers of competitors of defendant will no longer purchase plaintiffs' trailer, even though they are aware of the origin, because of their refusal to advertise the name MUSTANG and thereby bestow an unintended benefit to the competitive automobile of defendant. The plaintiffs further claim that since defendant's use of the mark it has been subject to embarrassing encroachment on the use of the mark by others in the trailer industry and litigation resulted with one

such alleged infringer. The plaintiffs say the "dilution doctrine" operates to protect the owner of a trade-mark against use of his mark by others on products of different descriptive properties, on the theory that the value of trade-marks, built up through extensive advertising and a good business reputation over a period of many years, would be gradually diminished by dilution, even though use of the mark by others could not lead to any confusion.

The State of Indiana, the situs of plaintiffs' business and in which the defendant is doing business, has no legislative dilution law and no common law precedent has been established by its courts. The United States Supreme Court has expressed no opinion on the doctrine. *Beech-Nut Packing Co. v. Lorillard Co.*, 273 U.S. 629, 47 S.Ct. 481, 71 L.Ed. 810. Five states, Illinois, Massachusetts, New York, Georgia and Connecticut, have adopted anti-dilution statutes. The State of Michigan, in which defendant has its principal manufacturing plant, has not legislatively adopted the anti-dilution doctrine but a United States District Court in Michigan in an opinion, without adopting the doctrine, observed that the doctrine has been sparingly applied. *Consolidated Cosmetics et al., v. Neilson Chemical Co.*, 109 F. Supp. 300, 310. Because of the pendency of plaintiffs' opposed application for a Federal trade-mark, it is also observed that Congress has not adopted an anti-dilution law. Absent a statute, is there a common law doctrine of dilution governing the rights and duties of these parties to each other? The defendant disputes this and urges that the dilution doctrine has not been accepted by the courts as unqualifiedly as the plaintiffs urge. *G. B. Kent & Sons v. P. Lorillard Co.*, 114 F. Supp. 621; *The Champion Paper & Fibre Company v. Nat'l. Assn. of Mutual Insurance Agents*, 249 F.2d 525. It is unnecessary for the Court to adopt the doctrine for the States

of Indiana or Michigan. Even if such common law doctrine was the law of the case, the facts of the case do not support plaintiffs' claim of violation of rights thereunder. The statutory provisions of states having the anti-dilution law and case law interpreting such laws exceed the common law doctrine of dilution. For example, the Illinois anti-dilution statute, Chapter 140, Section 22, Illinois Revised Statutes, which reads, so far as material with emphasis added:

> Every person * * * adopting and using a mark, * * * may proceed by suit, * * *, to enjoin subsequent use by another of the same or any similar mark, * * * if there exist a likelihood of injury to business reputation or of dilution of the distinctive quality of the mark, * * * notwithstanding the absence of competition between the parties *or of confusion as to the source of goods or services.*"

The common law doctrine does not go as far as the statutory created right and remedy. The authorities of the statutory states must be examined with care and compared with the common law principles before applying the case law of statutory states. The common law doctrine differs from the emphasized portion of the Illinois Statute and the doctrine which plaintiffs say is the common law. Judge Weinfeld pointed out some factors of the common law doctrine as applied in the case of *G. B. Kent & Sons v. P. Lorillard Co.*, 114 F.Supp., 621, 631:

> "Judge Learned Hand has referred to it as the economic interest which a senior user has in his mark outside the field of his own exploitation. While recognizing this right in the oft-quoted *Yale Electric Corp. v. Robertson* (26 F.2d 972, 974) it is significant that Judge Hand noted 'And so it has come to be recognized that, *unless* the borrower's use is so foreign to the owner's as to insure against any identifi-

> cation of the two, it is unlawful'. Thus, it appears that we come back to the point from which we started the element of likely confusion must be present. * * *.
>
> Analysis of the authorities, at least those in this circuit and in the New York State Courts, demonstrates that in each instance it was hinged to a factual situation which involved either likelihood of confusion, tarnishment, reasonable likelihood of expansion by plaintiff to include the junior product, diversion of trade or other directed injury."

The many cases cited by the parties (common law or statutory dilution doctrine) have been examined and no case extended the doctrine unless one or more of the following facts (none of which exists in the facts of this case) were established, (1) the plaintiff had a strong mark (an original, or coined, or unique name) which in the public mind had become associated solely with its products, such as "Kleenex", "Kodak", and "Polaroid"; (2) the plaintiff had such a celebrated name that defendant's use would immediately connect it in the public mind with plaintiff. The Stork Club case is a typical example, *Stork Restaurant, Inc. v. Sahati*, 166 F.2d 348; (3) a purchaser of defendant's products would think it emanated from the plaintiff because of the name; (4) likelihood of expansion of the plaintiff to include defendant's product; (5) diversion of plaintiff's trade to defendant; (6) tarnishment of plaintiff's good will; and (7) likelihood of confusion.

The evidence is that plaintiffs' mark is weak. It is not a celebrated mark, or original, or coined, or unique. It was in use by plaintiff for a short time before the defendant first used the mark on its display vehicle and its use ultimately in production and sale. Plaintiff's investment in advertising and promotion to develop it nationally was small. Plaintiff chose a mark that was much used

as the name of many products, including tractors, motorcycles, engines, trucks manufactured in England and Japan, automobile parts, cranes, clothing and other products. It had been registered in the United States Patent Office alone and in combination with the horse as a trade-mark at least thirty-four times for a variety of products. The common law does not extend the doctrine to the plaintiffs against the defendant or any of the prior users for such a saturated and already diluted trade-mark. The financial records of the plaintiffs, except for the period of construction and immediately after in expanding its plant to four times its former production capacity, is one of success. Sales increased after the accused dilution of plaintiffs' mark. Since its bankruptcy reorganization the plaintiff has continued the use of the mark MUSTANG and dropped the use of the other names.

When plaintiffs' predecessors chose and developed the weak mark, they accepted the weakness of the mark on the chance that others who were using the weak mark would dilute the mark as applied to plaintiffs' products by various means, including the conducting of a massive national advertising promotion of the other users' product so marked; and that some members of the public from such promotion would believe that plaintiffs' product is allied to the advertiser. Absent any other factor of unfair practice, plaintiffs would have no complaint for redress in law of such prior user smashing the market with his own product and mark. Plaintiffs have no right to the exclusive use of the mark under the facts of this case in all fields of products. Others, including the defendant, who enter the market place and adopt the weak mark for automotive products, or on products other than trailers, under the facts of this case, have the right to advertise

the product and mark the same as the plaintiffs and the prior users. Assuming the defendant was legally marked in the automotive field, then to support plaintiffs' dilution argument would be to say that it is unfair for the defendant to be so big financially as to be able to advertise and promote to such extent that it made a success of defendant's product in the automotive market which plaintiffs were unable to do financially in the trailer market before defendant, or that it was unfair for the defendant to advertise more than the plaintiffs and other prior users. The doctrine would hardly require a subsequent user, such as defendant, to limit its promotion to the plane of the plaintiffs and other prior users of the mark, if the subsequent user was legally marked absent any unfair practice. The law encourages industry to peddle its wares. There was no unfairness in the quantity of advertising by the defendant under the facts of this case. The defendant's competitive market is the adult public, or near adult, in the fifty states, who are financially able to acquire a motor vehicle. Advertising on a massive scale in the automotive industry must be undertaken to reach this market. The defendant simply vied for its just market in the manner and method and according to the custom and usage of the national automotive industry.

Under the facts of this case, it may be concluded in this posture of the case, by force of the non-disputed fact requirement of Rule 56 of the Federal Rules of Civil Procedure, that plaintiffs were likely to expand to a motorized trailer, but there is no likelihood of plaintiffs expanding to include the defendant's products under the facts of this case to support a claim under the doctrine of dilution.

Under the facts of this case, there was no diversion of plaintiffs' trade to the defendant to support a claim under the doctrine of dilution.

Under the facts of this case, there is no likelihood of tarnishment of plaintiffs' good will to support a claim under the doctrine of dilution. That good will tarnishment, of which the plaintiffs are offended, was within the bounds of what the plaintiffs could have expected had they appraised the past, present and future when chosing the weak mark, and the possibility and even probability that others, including subsequent users, would dilute this mark by massive advertising their own product.

Under the facts of this case, there is no likelihood of confusion of the origination of the plaintiffs' product to support a claim under the doctrine of dilution. That confusion of which the plaintiffs are offended was and is within the bounds of what the plaintiffs could expect the same as to their good will explained above. The prime buyers of the plaintiffs' products were the franchised dealers of the automotive industry together with dealers of trailers. Plaintiffs had no franchised dealers. Very few sales were made directly to the ultimate trailer user. The independent franchised automobile dealer of the various manufacturers of automobiles, and the trailer dealers, buy, sell, trade, advertise and promote the automobiles and trailers of all manufacturers. The franchised dealer, by contract, is committed to the contracted automobile product; nevertheless, to stay in the market place, he deals in other used automobiles and other products. The dealers and ultimate users, because of the high price range of automobiles and trailers, are discerning and informed buyers and there is no likelihood of their confusing plaintiffs' product as that of defendant and the confusion of

which plaintiffs complain in this regard is clearly within the bounds of what rights were acquired in their weak mark so mortgaged to the corresponding rights of others to the same mark used on products in another industry.

There being no genuine issue as to any material fact, under the issues of the three counts of plaintiffs' complaint and the answer thereto, and that plaintiffs have no claim thereunder based in law, the defendant is entitled to judgment as a matter of law.

IT IS ORDERED that the Clerk enter judgment in favor of the defendant and against the plaintiffs on each of three counts of the complaint with costs to be taxed in the manner provided by law.

Dated this 29 day of July, 1966.

/s/ Cale J. Holder
Cale J. Holder, Judge, United States District Court Southern District of Indiana

(IP 65-C-199)

DENIAL OF MOTION TO ALTER OR AMEND JUDGMENT OF JULY 29, 1966

Entry for October 5, 1966
Honorable Cale J. Holder, Judge

This cause came before the Court upon the plaintiff's motion to alter or amend the Judgment entered July 29, 1966, and the Court being duly advised in the premises now DENIES said motion.

(IP 65-C-199)

JUDGMENT ENTRY DENYING INTERVENTION

ENTRY

The above entitled action came before the Court for ruling on the plaintiffs' and petitioners' "Motion for Additional Parties, E. Edward Enochs, Bernice Enochs, And Buelah Vaught, To Be Added And/Or Intervene", which was filed August 29, 1966; the "Defendant's Brief In Opposition To Motion To Add Parties Plaintiff Or To Intervene", which was filed September 13, 1966; the plaintiffs' and proposed intervenors' "Motion To Allow Filing Of Pleadings By Intervenors" and memorandum, which was filed September 27, 1966; the brief entitled "Plaintiffs' And Intervenors' Reply Brief In Support Of Motion For Additional Parties E. Edward Enochs, Bernice Enochs, And Buelah Vaught To Be Added And/Or Intervene," which was filed September 27, 1966.

The plaintiffs and E. Edward Enochs, Bernice Enochs and Beulah Vaught are Ordered to make more specific within fifteen (15) days the allegations of items 2, 3, 4, 5, 6, 7 and 8 of their motion filed August 29, 1966 by stating the facts of each and providing copies of all pertinent written documents, and pertinent orders and proceedings of the United States District Court for the Northern District of Indiana in the pending bankruptcy of Westward Coach Manufacturing Company, Inc. in support thereof.

The plaintiffs and E. Edward Enochs, Bernice Enochs and Beulah Vaught are further ORDERED to file an appropriate pleading within fifteen (15) days to be tendered in support of the motion filed by them on September 27, 1966.

A final judgment was rendered for the defendant and against the two (2) plaintiffs in the captioned case on July 29, 1966. The action complains of tortious misconduct of infringement of trademarks and unfair competition on defendant's part after the incorporation of the plaintiff, Westward Coach Manufacturing Company, and its acquisition of an alleged common law and statutory trademark. These torts were against the plaintiff corporation and its successor administrator, the plaintiff, Trustee in Bankruptcy. The plaintiff corporation commenced this action in its name on April 28, 1965. It was disclosed at a pre-trial conference on April 6, 1966 that its officers had recently instituted, in behalf of the plaintiff corporation, a reorganization proceeding under Chapter XI of the Bankruptcy Act in the South Bend Division of the United States District Court for the Northern District of Indiana as Bankruptcy Cause Number 6191. Mr. Robert Spray, attorney for the plaintiff corporation, became aware, in the conference, that the action could not proceed with him as counsel without authority of the Trustee in Bankruptcy and possibly a substitution of the Trustee as the real party plaintiff for the plaintiff corporation and then only on authority of the United States District Court for the Northern District of Indiana. Thereafter, that Court authorized the Trustee to retain Mr. Spray as special counsel in the bankruptcy proceeding to conduct this action. On February 4, 1966, as authorized by that Court, Ray Grainger, Trustee of Westward Coach Manu-

facturing Company, Inc., petitioned to be added as a party plaintiff which was authorized by this Court in this action on February 8, 1966. Mr. Enochs chosen counsel, Mr. Spray, has continued to prosecute the action with continued uninterrupted aid from Mr. Enochs and the other petitioners and in the absence of some specificity as herein ordered the Court cannot on the alleged generalities reopen the presently pleaded issues of the complaint which have been settled by the judgment. It is difficult for the Court to ascertain from the facts of the case and the procedure followed prior to the judgment, within the knowledge of the Court, that the parties who now seek joinder and intervention should at this late date discover that they should have been or now should be parties to the action as pleaded.

The August 29, 1966 motion of the plaintiffs and E. Edward Enochs, Bernice Enochs and Beulah Vaught is DENIED on grounds 1, 9, 10, 11 and 12.

The September 27, 1966 motion of the plaintiffs and E. Edward Enochs, Bernice Enochs and Beulah Vaught is DENIED insofar as it is based upon grounds 1, 9, 10, 11 and 12 set forth in their August 29, 1966 motion and incorporated in their brief of September 27, 1966.

The facts before the Court resulting in the judgment of July 29, 1966 settling the pleaded issues in the captioned case disclose that Mr. E. Edward Enochs, individually, allegedly acquired and used the property right in the common law and statutory trademarks in issue in this action during the period from 1960 to September 21, 1962. They were wholly transferred from his individual proprietorship to the plaintiff corporation on September 21, 1962. The plaintiff corporation has remained in continuous ownership of the alleged trademarks since Sep-

tember 21, 1962 and its successor administrator in interest, the plaintiff, Trustee in Bankruptcy. Mr. Enochs was the principal stockholder, with the controlling interest, and the two (2) other petitioning intervenors were nominal stockholders. Mr. Enochs was the principal executive and driving force of the corporation and Mrs. Enochs participated actively in the affairs before the bankruptcy. The action makes no complaint of any tortious misconduct on defendant's part prior to the plaintiff corporation's acquisition of the alleged property right in the common law and statutory trademarks in issue and none are of record in the case. The plaintiff corporation commenced this action in its name on April 28, 1965. It was disclosed at a pretrial conference on April 6, 1966 that its officers had recently instituted, in behalf of the plaintiff corporation, a reorganization proceeding under Chapter XI of the Bankruptcy Act in the South Bend Division of the United States District Court for the Northern District of Indiana as Bankruptcy Cause Number 6191. Mr. Robert Spray, attorney for the plaintiff corporation, became aware, in the conference, that the action could not proceed with him as counsel without authority of the Trustee in Bankruptcy and possibly a substitution of the Trustee as the real party plaintiff for the plaintiff corporation and then only on authority of the United States District Court for the Northern District of Indiana. Thereafter, that Court authorized the Trustee to retain Mr. Spray as special counsel in the bankruptcy proceeding to conduct this action. On February 4, 1966, as authorized by that Court, Ray Grainger, Trustee of Westward Coach Manufacturing Company, Inc., petitioned to be added as a party plaintiff which was authorized by this Court in this action on February 8, 1966. Mr. Enochs chosen counsel, Mr. Spray, has continued to prosecute the action and

Mr. Enochs and his family have continued uninterrupted aid to counsel and the attempted injection of these new issues into the action after final judgment is prejudicial to the defendant and will only delay the ultimate conclusion. The claims asserted in grounds 1, 9, 10, 11 and 12 of the August 29, 1966 motion and reiterated in the September 27, 1966 motion and brief are at most indirect personal losses and wrongs suffered individually by the petitioners and are not actionable. To be actionable, such parties must have been the owners of the trademarks and operating the business when the alleged infringements and unfair competition of the defendant took place. The facts are as stated above that such petitioners were not such owners and operators when the alleged tort was committed but the unquestioned evidence is that the captioned plaintiffs were the owners of the trademarks and operators of the business. *Manz v. Philadelphia Brewing Co.*, (E.D. Penn. 1940) 37 F. Supp. 79, 81; *The Hertz Corporation v. Knickerbocker*, (S.D.N.Y. 1962) 206 F.Supp. 305; *Porter v. King County Medical Society*, (1936) 186 Wash. 410, 58 P.2d 367, 370; *Shubert v. Columbia Pictures Corporation*, (1947) 189 Misc. 734, 72 N.Y.S.2d 851, aff'd 274 App.Div. 571, 80 N.Y.S.2d 724, app. den. 274 App. Div. 880, 83 N.Y.S.2d 233; *Thos. Pipitone Inc. v. Pipitone Sales Corporation*, (1932) 235 App.Div. 502, 257 N.Y. Supp. 349, aff'd 261 N.Y. 584, 185 N.E. 748; *People of the Virgin Islands, et al. v. W. A. Taylor Co.*, (S.D.N.Y. 1951) 97 F.Supp. 737, 741-42. These claims do not qualify the petitioners as the real parties in interest in the issues adjudicated in the captioned action under the July 21, 1966 amended Rule 17 of the Federal Rules of Civil Procedure. The petitioners' individual claims, being unsupported in law, cannot be joined with the adjudicated issues

of the complaint in the captioned action under the July 21, 1966 amended Rules 17 and 20 and Rule 21 of the Federal Rules of Civil Procedure. The petitioners joinder as parties to assert these individual claims will not prevent complete relief between the parties to the caption case of the issues adjudicated, even if petitioners be assignees of damages from the captioned plaintiffs and become parties plaintiffs for such an interest, nor will their absence by reason of such individual claims impair or impede their ability to protect any interest in the issues of the adjudicated claims of the captioned parties, nor will their absence by reason of their not being parties to assert such individual claims leave any of the captioned parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of such individual claims; and, therefore, joinder is not authorized by the July 1, 1966 amended Rule 19(a) of the Federal Rules of Civil Procedure. The petitioners joinder as parties to assert these individual claims are untimely made; their intervention is not authorized by any statute of the United States; such new claims are not in issue in the adjudicated issues of the pleadings in the captioned action and consequently the judgment does not affect petitioners' claims nor are they adversely affected by the captioned plaintiffs, or their counsel's, Mr. Spray's representation; and such new claims of petitioners are not adversely affected by any distribution or disposition of property in the custody or subject to the control or disposition of a court or officer thereof and such new claims of petitioners are not claimed by the captioned plaintiffs in the adjudicated issues of the action; the issues of the captioned action having been adjudicated, the petitioners' new claims no longer have a common question of law or fact, if any there be, with the captioned parties and to reopen the issues only unduly

delay and prejudice the prompt termination of the litigation or the prosecution of the appeal from the final judgment; and, therefore, intervention of right is not authorized by the July 1, 1966 amended Rule 24(a) of the Federal Rules of Civil Procedure and permissive intervention is not authorized by Rule 24(b) of the Federal Rules of Civil Procedure. Such individual claims of petitioners were not transferred to them by the captioned plaintiffs, therefore, the petitioners cannot be substituted as parties plaintiffs for the captioned plaintiffs under Rule 25(c) of the Federal Rules of Civil Procedure.

Dated this 12 day of October, 1966.

/s/ Cale J. Holder
Cale J. Holder, Judge.
United States District Court
Southern District of Indiana

(IP 65-C-199)

DENIAL OF MOTION TO ALTER OR AMEND JUDGMENT OF OCTOBER 12, 1966

Entry for October 24, 1966

Honorable Cale J. Holder, Judge

This cause came before the Court upon the plaintiff's and Proposed Intervenors to Alter or Amend the Judgment entered October 12, 1966 and for extension of time and the Court being duly advised in the premises now DENIES the motion to alter or amend the Judgment entered October 12, 1966.

The Court GRANTS the motion for extension of time and the time is extended ten (10) days from the time set in the Judgment of October 12, 1966 to make more specific.

(IP 65-C-199)

DENIAL OF INTERVENTION

ENTRY

The above entitled action came before the Court for ruling on the plaintiffs' and petitioners' "Motion For Additional Parties, E. Edward Enochs, Bernice Enochs, and Beulah Vaught, To Be Added And/Or Intervene", which was filed August 29, 1966; the November 3, 1966 "Intervenors' Presentation As Ordered By Entry of October 12, 1966" and tendered amended complaint.

IT IS ADJUDGED, ORDERED AND DECREED that the Motion of the plaintiffs and the intervenors be and it is hereby DENIED and the tendered amended complaint be and is hereby stricken. The Court readopts the applicable findings in the Entry of October 12, 1966. The Motion and tendered complaint seeks to inject new issues which are not timely presented. The assignees of a portion of any recovery of the plaintiffs in this action are not assignees of the chose in action and have been prosecuting the action in the name of the assignors who possess the chose in action and the assignors also retain a partial

interest in any recovery and are fully protected in their assignment of damages by and through the assignors.

Dated this 7 day of December, 1966.

/s/ Cale J. Holder
Cale J. Holder, Judge,
United States District Court
Southern District of Indiana

JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN THE

United States Court f Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967—JANUARY SESSION, 1968

Nos. 16043 and 16071
WESTWARD COACH MANUFACTURING COMPANY, INC., and RAY GRAINGER, Trustee in Bankruptcy of Westward Coach Manufacturing Company, Inc.,
Plaintiffs-Appellants,
v.
FORD MOTOR COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis, Division.

January 9, 1968

Before HASTINGS, *Chief Judge,* and KILEY and CUMMINGS, *Circuit Judges.*

HASTINGS, *Chief Judge.* This is an action for trademark infringement and unfair competition brought by plaintiffs-appellants Westward Coach Manufacturing Company, Inc. and Ray Grainger, trustee in bankruptcy, against defendant-appellee Ford Motor Company on April 28, 1965, in the United States District Court for the Southern District of Indiana.

The three-count complaint charges Ford with infringement of Westward's common law trademark in the word MUSTANG with the representation of a charging horse; infringement of Westward's Indiana statutory trademark in the same word and representation; and unfair competition. The complaint seeks $3,000,000 in damages, punative damages and an injunction perpetually restraining Ford from using the mark MUSTANG and/or the representation of a charging horse in Indiana and throughout the world.

Upon the motion of Ford, and after a substantial record, including depositions, answers to interrogatories, affidavits, admissions of fact, and exhibits, was compiled, the district court entered summary judgment for Ford on July 29, 1966, pursuant to Rule 56(c), F.R.C.P., 28 U.S.C.A. Westward and Grainger appeal from that judgment.

Appellants E. Edward Enochs, Bernice Enochs and Buelah Vaught, all shareholders of Westward prior to its reorganization in bankruptcy (pursuant to Chapter XI of the Bankruptcy Act, 11 U.S.C.A.) and assignees of interests in this lawsuit, appeal from the judgment and from the district court's order of December 7, 1966,

denying their motion to intervene and striking their amended complaint.

Westward was incorporated in Indiana on September 21, 1962, as a successor to the unincorporated Westward Coach Manufacturing Company. The unincorporated Westward was founded by the appellant E. Edward Enochs in 1960 and began manufacturing pick-up campers (campers suitable for mounting on pick-up trucks) in September of that year. After incorporation Westward also began manufacturing travel trailers, designed for towing by a truck or automobile, and a few chassis-mounted campers for trucks.

The trailer industry is a large one. In 1965, a partial listing of manufacturers in the industry occupied seventy pages of a trade journal. The industry's sales of campers and trailers in the period of 1960-65 exceeded 875,000 units, of which Westward accounted for 1,234 sales.

Westward's products are sold principally through unfranchised dealers, some (approximately fifteen percent at the time this action was brought) of whom were also franchised dealers for new automobiles and trucks.

Westward marketed its trailers and campers under the names "Colt," "Palomino," "Pinto," "Stud," "Stallion," and MUSTANG. The MUSTANG name was first used in September, 1960, on campers and was subsequently used on travel trailers. Westward reserved the name for its highest quality products. Of the 1,234 campers and trailers sold by Westward in the period of 1960-65, 865 bore the MUSTANG name.

In January, 1962, Westward received an Indiana trademark registration on the MUSTANG name and repre-

sentation of a charging horse. The application stated that the mark would be used on "utility coaches, vehicle-carried accommodations for campers or travelers, vans, and the like."

Westward applied for federal registration of the mark on October 22, 1962. It overcame an opposition filed by White Motor Company and was issued a federal trademark on September 5, 1967. That trademark is for use on "utility van bodies mountable on pick-up trucks and small trucks for providing trailer-type housing and storage accommodations for travellers and sportsmen, coach bodies known as campers for providing such accommodation and mountable on an associated vehicle or carrying unit such as a truck or boat unit such as a pontoon frame, and trailers * * *." Westward's action is not founded on the federal trademark, and we may ignore it in this case.

Ford Motor Company is a leader in the automotive industry, manufacturing and marketing automobiles throughout the United States and in foreign countries. Consistent with industry practice, Ford markets its products through a nationwide system of independent franchised dealers.

In 1962, Ford built an experimental sports car which it exhibited at vehicle shows. The car, which was not initially produced for sale, was named MUSTANG and bore the representation of a running horse. Westward wrote Ford in December, 1962, notifying Ford that Westward had been using the MUSTANG name and horse representation since 1960, and requesting that Ford discontinue its use of the mark. In response, Ford expressed its opinion that Westward had no exclusive right to the MUSTANG trademark and that there was no likelihood

of confusion of Ford's products with Westward's products.

Ford began producing its MUSTANG sports car for sale in April, 1964. In addition to the MUSTANG name and the representation of a running horse, the car bore the name Ford. The introduction of the car was accompanied by a $6,000,000 advertising and promotion campaign, and an additional $10,000,000 was expended for advertising before October, 1965. In its advertising, Ford prominently displayed the Ford name, identifying the MUSTANG sports car as a Ford product and a member of "Ford's family of fine cars." In the first eighteen months of production, Ford sold 645,416 MUSTANG automobiles.

Ford has manufactured and marketed a Ford Econoline truck outfitted with living accommodations and referred to in Ford's advertising as a "camper." It has also advertised certain of its pick-up trucks as "Camper Specials." It has published an advertising booklet entitled "Ford Recreational Vehicles" and other publications promoting its products as recreational vehicles. It has engaged in joint promotions with trailer manufacturers. Ford does not manufacture or sell campers or travel trailers. However, some Ford dealers sell them in addition to Ford products.

Appellants allege that Westward has continuously and extensively used the name MUSTANG and representation of a charging horse in connection with its campers and trailers, and that through its extensive nationwide advertising and marketing effort the MUSTANG trademark had come to identify and distinguish its products. They allege that Westward's products and Ford's products are closely related and that Ford's use of the MUS-

TANG name and representation of a horse infringes Westward's trademark by creating a likelihood of confusion concerning the source of the products and by preventing Westward's expansion into the manufacture of self-propelled recreational vehicles. The allegations as to unfair competition are substantially the same.

At a pre-trial conference on January 6, 1966, it was disclosed that Westward had filed a reorganization proceeding in the United States District Court for the Northern Distfict of Indiana, pursuant to Chapter XI of the Bankruptcy Act, 11 U.S.C.A., and on February 8, 1966, appellant Grainger, the trustee in bankruptcy of Westward, was added as a plaintiff by order of the district court. The district court having jurisdiction of Westward's reorganization petition approved a plan assigning to the appellants E. Edward Enochs, Bernice Enochs, and Buelah Vaught an interest of approximately fifty percent in Westward's pending action against Ford, giving E. Edward Enochs the sole power to control the action, and charging him with the expenses of prosecuting the action. Five percent of the action was assigned to Westward, and the remainder to Westward's creditors, represented by the trustee, appellant Grainger.

The district court's order granting summary judgment to Ford was accompanied by an extensive memorandum opinion, which is reported at 258 F. Supp. 67 (1966). The court found no genuine dispute concerning the following facts. That the word MUSTANG is not a distinctive word, nor one originated by Westward or Ford, but is a noun of common usage denoting the wild or semi-wild horses introduced into North America by the Spanish conquistadores. That prior to Westward's or Ford's use of the name MUSTANG, it was used in connection with a

variety of products and had been federally registered as a trademark alone and in combination with the representation of a horse at least thirty-four times for a variety of products, including trailers. That there are at least 266 federal trademark registrations of a representation of a horse which are still in use. That Westward had used the trademark claimed by it continuously since September, 1960. That Westward's sales under the MUSTANG name totaled 579 units through 1964. That Westward's advertising and promotional expenditures, which were devoted principally to its MUSTANG campers and trailers, totaled $2,899.33 in 1960, $11,256.91 in 1961, $14,244.45 in 1962, $22,407.10 in 1963, and $42,953.70 in 1964. That Westward had no plans to build a motor vehicle, but did have plans to assemble trailer units on motorized chassis purchased from automobile manufacturers. And, that Ford's advertising and its warranty practices clearly communicated to the public beyond any doubt that Ford was the manufacturer, seller and warrantor of the MUSTANG automobile.

The court found as an undisputed fact that there is a common market of users and dealers for the automotive and trailer industries. It based this finding on these subfindings: that Ford's chassis, trucks and automobiles are convertible for use in the trailer industry or by the ultimate users of trailers. That some members of the automotive industry, *not including Ford,* have entered the trailer market in competition with Westward. That the trailer industry and trailer users are dependent for mobility upon the products of the automotive industry.

On the basis of these findings of undisputed fact, the court concluded that no genuine issue of material fact was presented and that Ford was entitled to judgment

as a matter of law. Specifically, the court's conclusions may be reduced to four.

First, the court held there is no likelihood of confusion concerning the origin of the MUSTANG automobile.

Second, it held that Westward's statutory and common law trademark is limited to products in the trailer industry. According to the court, since the name MUSTANG is not a coined or fanciful name, but a common noun, its application as a trademark is limited to the secondary meaning it acquired by Westward's use and registration of it.

Third, noting the common usage of the word MUSTANG, the short period of time between Westward's first use of the mark and Ford's first use of it, the small sum expended by Westward for advertising, the small production and sales of MUSTANG campers and trailers prior to Ford's use of the mark, the extensive prior and concurrent use of the mark on a wide variety of products and the extensive, prior registration of the mark for a variety of products, the court concluded Westward's mark was weak.

Finally, the court concluded that because Westward's mark was weak, it could not extend protection of the mark beyond the narrow limits of its secondary meaning in the trailer industry.

In the court's view there is no likelihood, considering the significance of an automobile or trailer purchase and the discerning character of dealers and users of automobiles and trailers, of their confusing the origins of Ford's and Westward's products. Whatever confusion might result concerning the origin of Westward's products is, the court felt, within the risk Westward took by choosing

and developing a weak trademark and is, for that reason, not actionable.

At the hearing on Ford's motion for summary judgment, on April 29, 1966, the parties Westward, Grainger, and Ford agreed that the motion presented substantive questions of law in the area of trademarks, tradenames and unfair competition. On oral argument before this court, counsel for appellants maintained that on the record there is likelihood of confusion as a matter of law, and that this court should so hold. Our review of the record discloses that the material facts are undisputed. The dispute on the merits is whether the type of confusion evidenced on the record constitutes trademark infringement or unfair competition. This is a question of law. On this record, the case is clearly an appropriate one for summary judgment. Rule 56(c), F.R.C.P., 28 U.S.C.A.

As a diversity case, state law is applicable on the issues of trademark infringement and unfair competition. *Pecheur Lozenge Co. v. National Candy Co.*, 315 U.S. 666 (1942); *Jewel Tea Co. v. Kraus*, 7 Cir., 187 F. 2d 278 (1950); *Addressograph-Multigraph Corp. v. American Expansion Bolt & Mfg. Co.*, 7 Cir., 124 F. 2d 706 (1941), cert. denied, 316 U.S. 682 (1942). Here, Indiana law is applicable.

The parties agree that the law of trademark infringement applicable to this case is identical with the applicable law of unfair competition. Trademark infringement is merely an aspect of unfair competition. Therefore, we may consider the common law trademark infringement and unfair competition issues together.

The Supreme and Appellate Courts of Indiana have held in a number of cases that the owner of a trademark

or tradename is entitled to protection against the adoption and use by a competitor of the same or a similar mark or name. *Smail v. Sanders*, 118 Ind. 105 (1889); *Keller v. B.F. Goodrich Co.*, 117 Ind. 556 (1888); *Minas Furniture Co. v. Edward C. Minas Co.*, 96 Ind. App. 520 (1929); *Jones v. Roshenberger*, 82 Ind. App. 97 (1924); *Hartzler v. Goshen Churn and Ladder Co.*, 55 Ind. App. 455 (1914); *Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 20 (1909). The second user's adoption of the trademark or tradename in these cases suggested fraud. The second user's apparent purpose was to cause confusion concerning the source of *its product*, thereby capitalizing on the established reputation of the first user's product and diverting business from it.

In these and other cases the Indiana courts have formulated the rule that unfair competition is the attempt to create confusion concerning the source of the unfair competitor's goods. *Rader v. Derby*, 120 Ind. App. 202, 207 (1950); *Minas Furniture Co. v. Edward C. Minas Co.*, *supra* at 532-533; *Jones v. Roshenberger*, *supra* at 99-100; *Hartzler v. Goshen Churn and Ladder Co.*, *supra* at 464, 465-466; *Deister Concentrator Co. v. Deister Machine Co.*, 63 Ind. App. 412, 420 (1916); *Computing Cheese Cutter Co. v. Dunn*, *supra* at 23-24. A typical formulation of the rule is contained in *Hartzler*:

> "Unfair competition is always a question of fact. The question to be determined in every case is whether or not, as a matter of fact, the name or mark used by defendant has previously come to indicate and designate plaintiff's goods, or, to state it another way, whether defendant, as a matter of fact, is by his conduct passing off his goods as plaintiff's goods, or his business as plaintiff's business." *Hartzler v. Goshen Churn and Ladder Co.*, *supra* at 465-466, quoting 38 Cyc. 779.

The Indiana Trade-Mark Act, Ind. Ann. Stat. § 66-142 (Burns' 1961 Repl.), appears to adopt the same test for infringement of a state-registered trademark. It provides in part:

> "[A]ny person who shall
>
> (a) use, without the consent of the registrant, any reproduction, counterfeit, copy or colorable imitation of a trade-mark registered under this act [§§ 66-130 to 66-145] in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source or origin of such goods or services; * * * shall be liable to a civil action by the owner of such registered trademark * * *."

We are without the benefit of construction of this statute by the Indiana appellate courts.

The pleadings, depositions, answers to interrogatories, admissions of fact, and affidavits in this case clearly do not present a genuine factual question of confusion concerning the source of Ford's products. They reveal that Ford's MUSTANG was plainly identified as a Ford product in advertising and otherwise. Appellants produced no material admissible evidence of likelihood of confusion concerning the MUSTANG automobile.

Similarly, the pleadings, depositions, answers to interrogatories, admissions of fact, and affidavits do not raise a genuine issue of fact regarding likelihood of confusion about the source of Westward's products. Appellants produced slight evidence of actual confusion, and Ford apparently concedes the likelihood that Westward's MUSTANG-marked products will be mistaken for products of Ford.

Ford contends that under Indiana law and under federal law, if it is applicable, the second use of a trademark is not actionable if it merely creates a likelihood of confusion concerning the source of the first user's product. We are, therefore, called upon to decide whether, as a matter of Indiana law, the creation of such likelihood of confusion is actionable.

As we have indicated, the Indiana cases have involved the adoption and use of a mark or name identical with, or similar to, the established trademark or tradename of a competitor. The Indiana appellate courts have not considered whether a second use creating the likelihood of confusion about the source of *the first user's products* is actionable. The tests of unfair competition and trademark infringement formulated by the Indiana courts, as in *Hartzler*, do not embrace the latter type of confusion. Insofar as they appear to fix the boundaries of trademark infringement and unfair competition, they are mere dicta. Appellants apparently put forth a suggested doctrine of "reverse confusion" concerning which we find no rational basis for support.

We conclude that the summary judgment entered by the district court should be affirmed on the ground that the evidence shows without contradiction that appellants' trademark rights do not extend to use of the mark on automobiles.

As stated by the district court, the word MUSTANG is not a unique or novel word, or one coined by appellants. It is a common noun. Prior to Westward's adoption of the word for its campers and travel trailers, it had been used on aircraft, automobile mufflers, automobile springs, automobile and truck brake linings, farm tractors, motorcycles, rebuilt automobile engines, storage batteries, hand

trucks, truck engines, truck mountable cranes, and numerous other items. The name MUSTANG had been federally registered as a trademark thirty-four times, once for trailers and truck trailers. The latter registration was canceled, by reason of abandonment, as a necessary, preliminary step in Westward's proceeding for registration of its trademark.

The law protects a trademark only if it is, or has become, distinctive. 3 Callman, Unfair Competition and Trade-Marks § 69 (2d ed.).

> "In essence, the distinctiveness and popularity of the trade-mark will determine its relative strength or weakness and will accordingly define the scope of protection to be accorded the mark against the confusing similarity of others. A mark is strong if it is conspicuously distinctive; it is distinctive if the public has already been educated to accept it as the hallmark of a particular source. Then too, a mark can be distinctive either because it is unique, that is, distinctive in itself, because it has been the subject of wide and intensive advertisement, or because of a combination of both. It seems to follow as a necessary conclusion that the trade-mark has the advantage of strength where its owner has invested a considerable amount in advertising or can point to a long period of time during which his mark was used on a great quantity of articles, as symbolic of his business * * *. If the mark is weak, its protection may have an 'extremely narrow scope'; and may indeed be limited to similar goods similarly marketed. Only the strong mark will be protected against infringements arising out of its use in connection with noncompeting goods." 3 Callman, Unfair Competition and Trade-Marks § 82.1 at 1503-1504 (2d ed.). See also, *Sunbeam Lighting Co. v. Sunbeam Corp.*, 9 Cir., 183 F. 2d 969 (1950), cert. denied, 340 U. S. 920 (1951); *Philco Corp. v. F. & B. Mfg. Co.*, 7 Cir., 170 F. 2d 958 (1948), cert. denied, 336 U.S. 945 (1949).

Appellants allege in their complaint that the name MUSTANG with the representation of a horse had been continuously and extensively used by Westward to designate its campers and trailers and that it had come to identify and distinguish those products to industry distributors and the general public. Ford countered these allegations with a substantial amount of evidence, most of it in the form of admissions of fact under Rule 36(a), F.R.C.P., 28 U.S.C.A.

Appellants admit that the name MUSTANG had been extensively registered and used as a trademark on a variety of products, some of them in the automotive field, prior to Westward's adoption of the mark. They state, in answer to Ford's interrogatories, that by the end of 1962, the year Ford introduced the experimental MUSTANG sports car, Westward had sold 253 MUSTANG campers and trailers and spent $28,400.69 in nationwide advertising of its MUSTANG products. They further state, in answer to Ford's interrogatories, that by April 1, 1964, shortly before Ford introduced its MUSTANG in the market, Westward had sold a total of 479 of its MUSTANG units and that by the end of 1964 it had expended a total of $93,761.49 for advertising. Finally, they admit that prior to 1965 Westward purchased and used on its campers and trailers the horse emblem used by White Motor Company to identify its MUSTANG truck engines.

In the period of 1960-65 Westward's sales of MUSTANG campers and trailers were less than one-tenth of one percent of total industry sales. During the first fifty-two months of production, through 1964, Westward's sales of campers and trailers were spread throughout twenty-eight states and reached or exceeded fifty units in only

six states. In no state did its sales average as much as two units per month in this period.

The uncontradicted evidence introduced by Ford shows beyond controversy that Westward's MUSTANG mark was a weak mark. Ford's production of this evidence in support of its motion for summary judgment placed upon appellants the burden of raising a genuine issue of fact by producing evidence of their own. *Markwell v. General Tire and Rubber Co.*, 7 Cir., 367 F. 2d 748 (1966); *Bradford v. School District No. 20*, 4 Cir., 364 F. 2d 185 (1966); *Lundeen v. Cordner*, 8 Cir., 356 F. 2d 169 (1966). They could not rely on the mere allegations of their complaint to defeat summary judgment. *Ibid.*

Appellants did not carry the burden of raising a genuine issue concerning the strength of their mark. The district court correctly concluded that Westward's mark was a weak one.

The district court was also correct in its conclusion that Westward's trademark is limited to the trailer industry. It is undisputed that Westward's campers and trailers do not compete with Ford's MUSTANG sports cars. Nor was it likely that Westward's business would expend to include the manufacture of automobiles. Finally, while the products of the automotive industry are necessary to provide mobility for the products of the trailer industry, and while the marketing channels of the two industries overlap somewhat, we cannot say that campers and trailers and sports cars are "similar goods similarly marketed."

The pleadings, depositions, answers to interrogatories, and admissions of fact show that no genuine issue of material fact exists and that Ford was entitled to judgment as a matter of law.

There remains only the question whether the district court erred in denying the motion of appellants E. Edward and Bernice Enochs and Buelah Vaught to intervene.

Rule 24(a), F.R.C.P., 28 U.S.C.A, provides for intervention of right in certain cases if the application is timely filed. Here the application was filed sixteen months after the complaint was filed and *one month after summary judgment was granted.* Appellants seeking to intervene were intimately involved in the prosecution of this action from its inception. Under the circumstances, we find no error.

In sum, by virtue of the oral agreement of the parties, the trial court, in determining the question of summary judgment, was faced with a question of substantive law, absent any disputed question of material fact.

In our judgment, the record establishes that there is no likelihood of confusion of the origin of Ford's MUSTANG automobile; that Westward's trademark is limited to its use in the trailer industry; that Westward's mark is weak and its protection cannot be extended beyond the narrow limits of its established use.

The judgment of the district court is affirmed.

A true Copy:

Teste:

AFFIRMED.

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

DENIAL BY COURT OF APPEALS OF PETITION FOR REHEARING AND/OR CERTIFICATION OF QUESTIONS TO THE UNITED STATES SUPREME COURT

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

WEDNESDAY, FEBRUARY 7, 1968

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

Nos. 16043 and 16071 WESTWARD COACH MFG. COMPANY, INC., RAY GRAINGER, Trustee in Bankruptcy of Westward, et al., *Plaintiffs-Appellants,* v. FORD MOTOR COMPANY, *Defendant-Appellee.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis, Division.

IT IS ORDERED by the Court that the petition for rehearing and/or certification of questions to the United States Supreme Court filed in the above entitled cause be and the same is hereby denied.

WESTWARDS FOREWARNING NOTICE LETTER TO FORD IN 1962

(Letterhead of)

ROBERT A. SPRAY
Attorney at Law

Post & 38th Professional Building
3675 N. Post Road, Suite No. 3
Indianapolis 26, Indiana

LIberty 7-9531

December 10, 1962

Office of the President
Ford Motor Company
Detroit, Michigan

Re: "Mustang" Trade-Mark of Westward Coach Manufacturing Company, Inc.

Gentlemen:

My client, Westward Coach Manufacturing Company, Inc., of Lafayette, Indiana, has become aware recently that Ford Motor Company has begun to use the mark "Mustang" for Ford vehicles.

For example, I refer to the November, 1962, issue of Popular Mechanics, page 93.

The trade-mark "Mustang" is a valuable property right of my client, who is using and has for an extended time used the trade-mark "Mustang" for utility coaches, often

referred to as "campers", which are mounted on and carried by a pick-up truck to provide vehicles with living and camping accommodations. The coaches of my client are of a high quality; and my client has spent considerable sums promoting the "Mustang" trade-mark.

We do not know that Ford has begun to use "Mustang" on this particular type of coach, nor even that Ford makes a camper coach of this nature; however, Ford does of course make various sorts of trucks and other vehicles and Ford has pictured various sorts of camper coaches in use with Ford trucks.

Accordingly, Ford's use of "Mustang" for vehicles, in the overall circumstances, seems quite likely to be a source of confusion of the public not only as to the source of my client's "Mustang" coaches, but the public would seem likely to think of "Mustang" coaches as a Ford accessory, and thus would direct inquiries concerning them to Ford instead of Westward.

Before you spent too much money in the promotion of the "Mustang" name for Ford, we call your attention to these factors, hoping that you will find it to your advantage to cease and desist using "Mustang" in the vehicle field; for your use in these circumstances is considered to be an infringement of Westward's trade-mark rights, and appears also to be legally-actionable unfair competition.

If forced to litigation, Westward will seek not only an injunction, but also substantial monetary damages, particularly considering the fact that Ford has illustrated camper coaches with Ford vehicles.

For the sake of immediateness of results, it may be that Westward may waive enforcement of the presently-

existing infringement, if a suitable settlement can be arranged. Your compliance, by both a mutally-acceptable settlement and Ford's withdrawal from use of the trade-mark "Mustang", by both Ford and its distributors, will thus absolve Ford from further liability for the present infringement.

If, alternatively, Ford desires to continue to use the "Mustang" trade-mark, Ford's substantial and continuing liability for both trade-mark infringement and unfair competition could be avoided by only a quite substantial settlement to compensate for my client's losses occasioned thereby.

My client, who has spent and is spending considerable sums of money in promoting good-will in the "Mustang" mark for its coach, is quite naturally desirous of an early resolution of this matter. I should think that Ford also should be quite desirous of an early resolution, avoiding controversy and litigation, and of avoiding the further expenditure of promotional funds with respect to a trade-mark of another, trade-mark rights both by common-law and by registration.

Accordingly, may I have your early reply, say no later than December 28, 1962.

Sincerely,

/s/ Robert A. Spray
Robert A. Spray, Attorney

RAS:fw

cc: Westward Coach Mfg. Co., Inc.
Office of the President

FORD'S RESPONSE LETTER IN 1962

(Letterhead of)

FORD MOTOR COMPANY

Wright Tisdale
Vice President and General Counsel

The American Road
Dearborn, Michigan

December 19, 1962

Robert A. Spray, Esq.
Post & 38th Professional Building
3675 N. Post Road, Suite No. 3
Indianapolis 26, Indiana

Dear Sir:

Mr. Dykstra has referred to me your letter dated December 10, 1962, addressed to the Office of the President of Ford Motor Company, concerning our use of the name "Mustang" to identify one of our display cars.

We cannot agree that our use of the name "Mustang" to identify one of our display cars in any way infringes upon the rights of your clients. The name "Mustang" has been used by a number of manufacturers for many years to identify a variety of products adapted for use on vehicles. Several of these products are of the same type as those that you state are manufactured by your client. We are not aware of any instance of confusion between those products and the products of our Company, nor do we believe that there is any likelihood that

they, or the products of your client, would be confused with our products.

It is our practice to insist upon our legal rights in trademarks, and to respect the legal rights of others in their trademarks. After careful consideration, we have concluded that your client does not have any exclusive right to the use of the name "Mustang" for vehicles that is infringed by our use of the name to identify a display car. I feel confident that upon further consideration you will agree with our view.

Sincerely yours,

WT:br

STATUTES

15 U.S.C. 1114: Remedies; Infringement; Innocent Infringement by Printers and Publishers

(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive [An amendment in 1962 deleted at this point the following additional words: "purchasers as to the source of origin of such goods or services"]; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels • • • intended to be used in commerce upon or in connec-

tion with the sale * * * or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) of this section, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive * * * July 5, 1946, c.540, Title VI., Sec. 32, 60 Stat. 437; Oct. 9, 1962, Pub.L. 87-772, Sec 17, 76 Stat. 773.

INDIANA TRADEMARK STATUTE

(Relevant portions only)

66-142. Improper use of registered mark or imitation—Damages.—Subject to the provisions of section 15 [§ 66-144] hereof any person who shall

(a) use, without the consent of the registrant, any reproduction, counterfeit, copy or colorable imitation of a trade-mark registered under this act [§§ 66-130—66-145] in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source or origin of such goods or services; or

(b) reproduce, counterfeit, copy or colorably imitate any such trade-mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used upon or in conjunction with the sale or other distribution in this state of

such goods or services shall be liable to a civil action by the owner of such registered trade-mark for any or all of the remedies provided in section 14 [§ 66-143], except that under subsection (b) hereof the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such trade-mark is intended to be used to cause confusion or mistake or to deceive. [Acts 1955, ch. 174, § 13, p. 449; 1959, ch. 256, § 6, p. 599.]

66-143. Enjoining manufacture, display or sale of counterfeits or imitations—Damages.—Any owner of a trade-mark registered under this act [§§ 66-130—66-145] may proceed by suit to enjoin the manufacture, use, display or sale of any counterfeits or imitations thereof and any court of competent jurisdiction may grant injunctions to restrain such manufacture, use, display or sale as may be by the said court deemed just and reasonable, and may require the defendant to pay such owner all profits derived from and/or all damages suffered by reason of such wrongful manufacture, use, display or sale; and such court may also order that any such counterfeits or imitations in the possession or under the control of any defendant in such case, be delivered to an officer of the court, or to the complainant, to be destroyed.

The enumeration of any right or remedy herein shall not affect a registrant's right to prosecute under any penal law of this state. [Acts 1955, ch. 174, § 14, p. 449.]

66-144. Common-law rights unaffected.—Nothing herein shall adversely affect the rights or the enforcement of rights in trade-marks acquired in good faith at any time at common law. [Acts 1955, ch. 174, § 15, p. 449.]

AFFIDAVITS OF RECORD

LETTER (Verified)
by E. S. Barker, a Trailer Dealer

(Letterhead of)

TRAILER VILLAGE SALES, INC.

U.S. #1 — Kittery, Maine

Kittery, Maine
April 29, 1966

"Area Code 207
439-0545
Robert A. Spray
Attorney At Law
3675 N. Post Rd.
Indianapolis, Indiana

Dear Sir:

"In answer to your inquiry about the confusion created by the use of the name Mustang by Westward Coach Co. of Elkhart, Indiana and also the Ford Motor Co. I have found that there is a lot of confusion. As Ford now is going into the recreational vehicle business, a lot of people think that a Mustang Car and a Mustang travel trailer are both made by Ford Motor Co. Westward Coach has always built a quality travel trailer in the best class, and they are expensive. Ford Motor Co. has recently come out with the Mustang car which is a low priced model of sports car and in my opinion not in the good class of their other products.

"I have had many people say to me that they did not want to buy a Mustang travel trailer because they confused it with the Mustang car and thought that both were made

by FORD, and were low priced competative units. I have had to explain many times that Westward Coach has been using the name Mustang since 1960 and have been building a quality travel trailer since then, and that FORD MOTOR CO. has recently come out with the MUSTANG sports car and are using the same name and that a lawsuit is in progress.

"Also my competition is capitalizing on this situation, as they will tell a customer that they are both made by FORD. I have to point out to the customer the name plate saying that the travel trailer was made by Westward Coach Co. Then I get a rebuttal from the customer that they have been told that WESTWARD Coach Co. is a subsidery of FORD MOTOR CO. I try to explain that they have no connection, some people will believe me and others will have their doubts because of the same name.

"In closing I would like to state that I believe that the use of the same name by both compan's is very confusing, and that Westward Coach Co. was using the name MUSTANG long before FORD MOTOR CO. to the best of my knowlege and they should be entitled to continue to use it.

Yours truly

/s/ E. S. Barker, President
Trailer Village Sales, Inc.
Kittery, Maine

"Sworn and Suscribed to before me this 29th day of April 1966 in the county of Rockingham in the State of New Hampshire.

/s/ Irene R. Lelul
Notary Public
My commission expires Sept. 19, 1968"

ABSTRACT OF AFFIDAVIT

of Spencer Galbreath, a Trailer Dealer

"5. While handling Westward's Mustang trailers, I experienced from practically every customer and shopper nothing but confusion, relating to the Ford "Mustang" and Ford. Shoppers continually would ask me if the Mustang was a Ford product, and I would say, "No, it's a Westward product." They would say, "Well, maybe Ford doesn't want it to be known that they own the company, but we know that Westward wouldn't be using the name if Ford wasn't connected or standing behind it." This was the substance of many occasions.

"6. The supposed Ford-affiliation of Westward's Mustang was so strong that the people, who inquired about some sort of Ford affiliation, were very hard to convince that Westward's Mustangs were not owned or affiliated with Ford, even by telling each inquirer the non-Ford affiliation one or two times, so I would not then argue further with the inquirer or try further to correct him, for I am not in the business of trying to un-confuse the public after telling them the truth, on a matter about which they express so definitely their own assumption. It was hard for me as a salesman; for although many still seemed unconvinced and skeptical of my comments and thus no doubt of me also, I knew I could not argue too much yet still keep the customer or shopper on a friendly basis."

ABSTRACT OF AFFIDAVIT

of Costa Markos, a Trailer Dealer

"[There] has been quite a bit of confusion over the name "Mustang." I would guess that about one fourth

of the prospective buyers asked me if Mustang travel trailers were owned by Ford Motor Co. * * * In my opinion the situation is getting worse with time."

ABSTRACT OF AFFIDAVIT

of J. Harold Daniels, a Trailer Dealer

"In general, I would say without hesitation that every week I have several remarks relating Mustang travel trailers with Mustang automobiles and Ford."

ABSTRACT OF AFFIDAVIT

of James E. Lyboldt, a Chevrolet Dealer who sold Campers also.

"That was the end of my advertising the Mustang camper. I had no desire to advertise for the Ford Motor Company."

ABSTRACT OF AFFIDAVIT

of Howard Johnson, a Trailer Dealer

"6. I have heard comments from several people in the Kokomo area to the effect that they would not buy a Westward "Mustang" because they feel that Ford would soon put Westward out of business."

ABSTRACT OF AFFIDAVIT

of Ivo Heckaman, President of a Competitive Manufacturer which makes "Phoenix" Trailers

"2. Westward's said "Mustang" products were very good, like a Cadillac automobile in reputation. * * *

"6. In view of Westward's advertising and promotions, and exhibits at shows, of its trademark "Mustang" for its

recreational vehicles of various types, the trademark "Mustang" was accepted by the trade and the public as identifying recreational vehicle products (including campers and travel trailers) of a single source or manufacturer, prior to the spring of 1964 and for many months prior thereto; and that manufacturer was Westward Coach Manufacturing Company.

"7. In view of Westward's advertising and promotions, and exhibits at shows, of its trademark "Mustang" for its campers of various types, the trademark "Mustang" was accepted by the trade and the public as identifying various styles of campers of a single source as long ago as early 1962; and that manufacturer was Westward Coach Manufacturing Company."

ABSTRACT OF AFFIDAVIT

by James H. Baker, Sales Manager of Chevrolet Dealer

"4. I would not want this Chevrolet dealership to handle or promote recreational vehicles with the trademark "Mustang," because of the many factors of close relationship of recreational vehicles to the automotive industry, and because I feel that "Mustang" is now a Ford name in this overall field for reasons including the overwhelming promotion by Ford of the name "Mustang" for its product and the extreme closeness of the fields; thus I would be promoting my competitor Ford. This is my reaction regardless of the quality of a Mustang recreational vehicle, and my reluctance is even stronger according to the quality of the Mustang recreational vehicle."

ABSTRACT OF AFFIDAVIT

by Ebert D. (Rex) Cox, Jr., an Executive in Recreational Vehicle Trade Assn.

"4. These Westward "Mustangs" were of very high quality of the prestige and luxury class, very attractive products. * * *

"13. Westward's "Mustangs" were becoming increasingly accepted, for reasons as mentioned above, even though Westward's "Mustang" was just getting started and beginning to grow in the years 1960 and 1961 which were years of slight slump in the industry, the survival of and the increasing acceptance of Westward's "Mustangs" in those slump years of the industry particularly indicating their commercial appeal and business prospects. * * *

"21. The recreational vehicle industry, including truck campers and travel trailers, has been growing at a fantastically good rate, after a slight slump in 1960 and 1961, and has fantastically good business prospects for the foreseeable future. Companies, other than Westward, who are at all comparable to Westward with respect to experience, reputation, capacity, and quality, price, advertising and other product factors are doing very good business at present and throughout 1964 and 1965; and they generally correspond to the continuing growth indicated herein for the industry as a whole."

ABSTRACT OF AFFIDAVIT "F"

by E. Edward Enochs

"5. Ford in 1966, in its advertising booklet, "Mustang! 1966 Mustang! Mustang!" (Exhibit M) advertises it for pulling trailers, and provides a special cooling package if desired for trailer-pulling service. The booklet's rear

cover states "Own a trailer? Planning to buy one? Your Ford dealer can help you equip your new Mustang for many of the popular sizes. The Mustang optional equipment suggestions listed here can add a great deal to smooth-sailing trailer trips with your Mustang." There is no hint of limiting the use to pulling boat trailers."

ABSTRACT OF AFFIDAVIT "G"

by E. Edward Enochs

"1. The expression "recreational vehicle" has been coming into a general and wide use since about 1963 or 1964 to include various types of pick-up campers, chassis mounts, soft-top tent trailers (fold up), travel trailers, and motorized units, car campers, and others useful for recreational living or camping purposes providing living accommodations. The expression is found now commonly in most all magazines relating to the trailering and camper interests, and in other references, and is illustrated by the page 121 attached (as Exhibit A) from *Mobile Home/Travel Trailer Dealer*, April 20, 1966, which illustrates many types from a tent camper to a motorized home.

"2. Ford itself uses the same term "recreational vehicles" for *Ford's own products.* For example:

a. In 1964 Ford published an advertising booklet entitled "Ford Recreational Vehicles." (Exhibit B attached) The term is used on at least the front and back covers, and on the inside front cover wherein, in speaking of the Ford fleet it is said, "We call them the Ford Recreational Vehicles." In the *same* booklet, page 6, Ford uses the *same* term "recreational vehicle" in obvious reference to the various types of living-quarter products.

"b. Ford's vice-president, Donald N. Frey, is quoted as speaking of "'Ford's wide range of recreational vehicles" in *Mobile Home/Travel Trailer Dealer* (a trade publication) April 20, 1966, page 126.

c. Ford's ad in the *Indianapolis Star,* (March 25, 1966, page 26) (Exhibit C attached) uses the text "Ford The Leader in Recreation Vehicles."

"3. As illustrated in the above, both Westward's "Mustang" products, and Ford products, are known by the same specialized term "recreational vehicles" in referring to their products."

ABSTRACT OF AFFIDAVIT "N"

by E. Edward Enochs

"2. My [Westward "Mustang"] products were given a *5-star* (the highest) quality certified rating by Mobile Home Journal, a national trade magazine."

ABSTRACT OF AFFIDAVIT "S"

by E. Edward Enochs

1. Ford has been a strong leader in promoting the recreational vehicle industry. Ford itself held a large camper and trailer show and demonstration in 1963 at which Westward and its "Mustangs" were present.

2. Ford's promotion of the recreational vehicle field earned Ford several awards such as that in 1964 of Camper Coachman Magazine.

3. Ford promotes competitors of Westward, such as Sears & Roebuck, by joint promotions and by itself or its dealers as they promote specific recreational vehicle companies such as Trail Haven and Gold-Line.

4. Ford's activity in the recreational vehicle industry has been so strong that Mobile Home Journal's forthcoming June, 1966, (already distributed) tells of a rumor that Ford has purchased a large trailer firm. Whether the rumor is true is not known to me, but the fact of the rumor is well known.

5. Ford officials have indicated that Ford would not actually go into the business until volume got much larger; but, the joint promotions of Ford and its dealers make it in the recreational vehicle business already.

ABSTRACT OF FRANK RIZZO DEPOSITION

Taken on July 22, 1965

Frank Rizzo, Sales Manager of Westward Coach Manufacturing, Inc. since August, 1964, testified as follows: (Numbers in parenthesis deposition transcript pages)

Car dealers whose business nature makes them desirable as joint dealers in recreational vehicles (10), are becoming increasingly involved in the recreational vehicle field (7, 15). About 15% of Westward's dealers are car dealers (7).

Even though the car dealers like Westward's "Mustang" (9), and automobile dealers are continuously solicited (14) in a strong and repetitive manner (10), Westward could not obtain non-Ford automobile dealers to handle Westward's "Mustang" units because of the Ford "Mustang" name-confusion (8, 9, 11, 12, 14, 15).

The quality of Westward's "Mustang" is the highest (20, 21), but Westward's reputation has been hurt by the supposition it is Ford-affiliated (37). People would ask Westward if it is a Ford affiliate (34) and express the thought that Westward's "Mustang" might be built as cheap as the "Mustang" automobile (37).

Westward's sales were not as much as expected in 1964 and 1965 (38, 42, 55), but could have been a couple of million dollars (56).

Westward made plans in October, 1964 to expand into motorized homes (58, 59, 60) as other recreational vehicle manufacturers had (60). Motorized units would come within the general framework of Westward's distribution (60, 61).

Automotive manufacturers including Ford, Chevrolet and Dodge are affiliated with motorized homes (60, 62, 63).

ABSTRACT OF E. EDWARD ENOCHS

DEPOSITION, Taken on July 22 and July 23, 1965

In 1963, Westward turned away about four times its business because it lacked production capacity (69, 253), and therefore plans to quadruple its capacity in 1963, before Ford's entry, were completed in 1964 (69, 75, 253, 254) and put into use. Capacity with the new facilities of 1964 was about 15 to 20 per cent (77), while only 7 to 12 per week in 1963 (82). Sales in 1965 of about $500,000.00 should have been at least $2,000,000.00 (69, 70).

ABSTRACT OF AFFIDAVIT "E"

by E. Edward Enochs

Mr. Enochs, with supporting exhibits, refers to and shows several Ford publications published as early as the first part of 1964 in which recreational vehicles are prominently displayed.

ABSTRACT OF AFFIDAVIT "I"

by E. Edward Enochs

Mr. Enochs states that Westward considered as early as 1961 future expansion into motorized recreational vehicles and even contacted a concern that produced chassis in 1963; sold chassis mounted campers as early as 1962; and felt that Ford's use of "Mustang" on automobiles blocked expansion into motorized recreational vehicles.

ABSTRACT OF AFFIDAVIT "J"

by E. Edward Enochs

Mr. Enochs states that sales grew from $31,000.00 in 1960 to several hundred thousand dollars per year; that many orders were turned away in 1963 because of insufficient capacity precipitating the decision to increase capacity by ordering two new buildings that were completed in 1964.

ABSTRACT OF AFFIDAVIT "K"

by E. Edward Enochs

Mr. Enochs identifies over fifty separate advertisements of Westward's products placed by Westward in newspapers and nationally-distributed magazines in the years 1960 to 1965.

ABSTRACT OF AFFIDAVIT "L"

by E. Edward Enochs

Mr. Enochs states that he tried to keep the lack of expected sales in 1964 a close secret; felt Ford's use of "Mustang" was irrevocably hurting Westward; Westward's "Mustang" enjoyed a high reputation as a quality

product at a quality price; Westward took money-losing steps in 1964 and 1965 in an effort to bolster sales in producing low-profit other than "Mustang" type units and loading down "Mustang" units with extra features and accessories without a corresponding price increase; and prior to Ford's adoption of "Mustang" in early 1964, there had not been too significant a view that Westward's prices were too high for its quality product.

ABSTRACT OF AFFIDAVIT "M"

by E. Edward Enochs

Mr. Enochs states that Westward's promotion, through the years of "Mustang" had stressed the relation of its products to the cowboy West; "Mustang" was suggestive of rugged construction, sturdiness, strength, the feeling of exciting promise, on-the-go nature, and adventure; and "Mustang" had high appeal for Westward's recreational vehicles.

ABSTRACT OF AFFIDAVIT "Q"

by E. Edward Enochs

Mr. Enochs states that the term "camper" is jointly used by the recreational vehicle industry and the automotive industry; Ford's Econoline living-quarter van is referred to as a camper; and Ford calls its pick-up truck a "Camper Special".

ABSTRACT OF AFFIDAVIT "P"

by E. Edward Enochs

Mr. Enochs stresses that the public has strong likes and dislikes for products of automotive manufacturers; Ford has a bad reputation with many people as evidenced

by published articles on the "Edsel" and other published articles and public expressions; and the recent car-safety inquiry increases the risk from a reputation standpoint of a related product using a brand name that is the same as that of an automotive manufacturer.

ABSTRACT OF AFFIDAVIT "Q"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that "Mustang" was listed as Westward's in the 1961, 1962 and 1963 "Manufacturer's Brand Names" listing by Mobile Home Dealer, a national trade magazine; several infringements of Westward's "Mustang" trademark, all apparently starting subsequent to Ford's 1964 entry of its "Mustang" automobile, were short-lived after being pursued by Westward, although one infringer said it did because of Ford's activities and another did in an apparent joint promotion with Ford.

ABSTRACT OF AFFIDAVIT "R"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that since 1961 there has been an increasing acceptance of motor homes and increasing mention of automotive manufacturers, including Ford, in the recreational vehicle field; Westward's "Mustang" campers have been advertised in national publications side-by-side with motor homes of various manufacturers; motor homes are sold under both the trademarks of automotive manufacturers and recreational vehicle manufacturers; and Ford dealers sell the "Condor" and the "Econoline" fitted with living quarters placing them in the motor home classification.

ABSTRACT OF AFFIDAVIT "T"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that in 1963, Ford, Dodge and Chevrolet motors homes and Westward's "Mustang" camper appeared on the same page of a nationally distributed magazine; and in an advertisement of Ford's "Camper Special Pickup", a camper body is mounted thereon.

ABSTRACT OF AFFIDAVIT "U"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that Ford and other automotive manufacturers have been mentioned in articles, ads and displays published in recreational vehicle magazines, many such articles, ads and displays illustrating an automotive or truck vehicle in association with a recreational vehicle.

ABSTRACT OF AFFIDAVIT "V"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that many non-Ford automotive companies provide literature and advertising relating to recreational vehicles.

ABSTRACT OF AFFIDAVIT "W"

by E. Edward Enochs

Mr. Enochs states, with supporting exhibits, that there are innumerable diversification and varieties of types and styles of recreational vehicles, including both car-top and chassis mount campers.

UNITED STATES CONSTITUTIONAL PROVISIONS

ART. 1, SECTION 8 "The Congress shall have power . . . [clause 3] To regulate Commerce . . . among the several States. . . ."

FIFTH AMENDMENT

. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

FOURTEENTH AMENDMENT

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56(c) . . . The judgment sought shall be rendered if . . . there is no genuine issue as to any material fact. . . . .